Petition

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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

SILLER BROTHERS, INCORPORATED,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTION PRESENTED

Whether the United States Forest Service by failing to refer the matter to the Small Business Administration for final disposition violated the Small Business Act when it unilaterally barred a small business from bidding on a timber resale solely because that company had defaulted on the original sale.

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SILLER BROTHERS, INCORPORATED,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, Siller Brothers, Incorporated, prays for a writ of certiorari to review the opinion and order of the United States Court of Claims entered in this case.

OPINION BELOW

The opinion of the Court of Claims is reported at 655 F.2d 1039 and is set forth in Appendix A. (1a-15a.) The Order of the Court of Claims denying Petitioner's petition for rehearing and rehearing *en banc* is set forth in Appendix B. (16a.)

JURISDICTION

The opinion of the Court of Claims was entered on June 17, 1981. Petitioner's petition for rehearing or rehearing *en banc* was denied on October 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

STATUTE INVOLVED

The pertinent provision involved is Section 8(b) of the Small Business Act, as amended, 91 Stat. 561, 15 U.S.C. § 637(b)(7)(A) (Supp. I 1977), which is set forth in Appendix C to this petition. (17a.)

STATEMENT OF THE CASE

This case involves a dispute arising out of the Lake Creek timber sale on the Big Horn National Forest in Wyoming. On August 15, 1974, Petitioner, Siller Brothers, Inc., a qualified small business under the Small Business Act[1] was awarded the Lake Creek timber sale, Contract No. 02-962, by Respondent, the United States Forest Service. Under Contract No. 02-962 Petitioner was obligated to remove all timber included in the sale within a three-year period. At the end of this three-year term, Petitioner had not removed all of the timber required under the contract.[2]

Following termination of the contract, Respondent notified Petitioner that damages would be assessed against it

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[1] 15 U.S.C. § 631 *et seq.* The respondent does not contest Petitioner's status as a qualified small business under the Act. Appendix A at 6a.

[2] The decision below erroneously stated that at "the end of the term the Petitioner had not felled a single tree". Appendix A at 2a. In fact, the record shows that Petitioner had constructed some 5.86 miles of road and in the course of this construction necessarily cut a substantial portion of the right-of-way timber required for road construction. Appendix A at 2a. It is apparent that this erroneously presumed fact weighed heavily with the Court of Claims. However, the precise amount of timber cut by Petitioner is irrelevant to the legal issue raised in this Petition. Moreover, if Petitioner had been allowed to bid on the resale of the Lake Creek timber contract and had been accorded SBA Certificate of Competency procedures, which it was denied, Petitioner contends that it would have proved to the satisfaction of the SBA Administrator that its failure to cut all of the timber in question was due to unique circumstances, totally beyond its control and not because of any lack of responsibility on its part.

under the contract based upon any losses that might be suffered by Respondent on the resale of the Lake Creek timber.

Although Petitioner twice requested that it be permitted to bid on the resale of the Lake Creek timber, the Forest Service refused to allow Petitioner to submit a bid. Appendix A at 3a. The reason stated by Respondent for its refusal was that Forest Service regulations prohibited consideration of any bid on a timber resale from a purchaser who had defaulted on the original sale, "unless acceptance of such bid is determined to be in the public interest." 36 CFR § 223.5(h)(1), Appendix F at 26a. At the subsequent resale there was only one bidder, and only one bid was submitted at 5¢ above the minimum acceptable bid price. Appendix A at 3a.

After the resale, Respondent submitted to Petitioner a bill for damages incurred less the amount of Petitioner's bid deposit on the original sale and road credits[3] due Petitioner under the original contract for road construction performed prior to termination. Petitioner subsequently filed the instant action in the Court of Claims seeking return of its bid deposit and the dollar value of the road credits withheld by Respondent, and Respondent counterclaimed for its alleged damages in excess of Petitioner's deposit plus road credits.[4]

Shortly after suit was filed, Petitioner moved for summary judgment on the ground, *inter alia*, that by barring Petitioner from bidding on the resale of the Lake Creek timber on the sole ground of Petitioner's default

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[3] Under the Lake Creek contract, as under most Forest Service timber sale contracts, the purchaser was to be compensated for road construction on the sale through the application of certain earned road credits to reduce the purchaser's periodic payments to the Forest Service for timber removed from the sale.

[4] Petitioner seeks return of $92,869.80 as the value of road credits withheld and its $6,233 bid deposit. Respondent's counterclaim is for $45,772.15. Appendix A at 3a.

on the original contract without referring the matter for final disposition to the Small Business Administrator, the Forest Service violated the Small Business Act, 15 U.S.C. § 637(b)(7)(A) and deprived Petitioner of its right to SBA Certificate of Competency procedures thereunder.[5] Respondent then cross-moved for summary judgment but did not dispute the applicability of the Small Business Act to the Lake Creek resale. Instead, Respondent argued that it was the obligation of Petitioner, and not that of the Forest Service, to refer the matter to the Small Business Administration and that Petitioner waived its right to SBA Certificate of Competency procedures by failing to request SBA to review the matter.[6]

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[5] Full text of § 637(b)(7)(A) is set forth in Appendix C and analyzed in detail at pages 5-7, *infra*. "Certificate of Competency" or "COC" procedures refer to the process authorized by 15 U.S.C. § 637(b)(7)(A) under which a contracting Government agency is required to submit any agency finding of nonresponsibility against a small business prior to award to the Small Business Administrator for final disposition, which, if favorable to the contractor, results in SBA issuance of a Certificate of Competency for that business. The COC is binding upon the contracting agency. See Appendix D at 22a-23a.

[6] The Court of Claims did not address this argument by Respondent. However, it is well established that following a nonresponsibility determination by the Government sale officer, it is incumbent upon the Government agency (and not the rejected bidder) to refer the matter to SBA for a final determination of nonresponsibility. 15 U.S.C. § 637(b)(7)(A); HUB Testing Laboratories, B-199368, September 18, 1980, 80-2 CPD ¶ 204; Sam's Machine & Tool Shop, Inc., B-198141, August 26, 1980, 80-2 CPD ¶ 152; Alderson Reporting, B-197663, April 21, 1980, 80-1 CPD ¶ 279, Angelo Warehouses Co., B-196780, March 28, 1980, 80-1 CPD ¶ 228. Indeed, the Department of Agriculture, based on prior cases in which it has been involved, knew or should have known that such referral requirements to SBA have been held especially applicable to situations involving the pre-qualification of participants prior to actual bidding. Department of Agriculture's Use of Master Agreements, 56 Comp. Gen. 78 (1976); *also see*, Office of Federal Procurement Policy Film Production Contract System, et al., B-198360, December 9, 1980, 80-2 CPD ¶ 419.

Even though Respondent conceded the applicability of the Small Business Act COC procedure to the Lake Creek resale, the Court of Claims, *sua sponte*, reviewed the language and legislative history of § 637(b)(7)(A) of the Small Business Act and concluded that the Act did not apply to the reletting of a contract after a small business had defaulted in performance. Appendix A at 8a. Accordingly, the Court of Claims granted Respondent's cross-motion for summary judgment and denied the motion of Petitioner. On October 2, 1981, the Court of Claims denied Petitioner's motion for a rehearing or, in the alternative, for a rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

I. The Decision Below is in Direct Conflict With the Unambiguous Language of the Small Business Act and the Long-standing Interpretation and Administration of that Act by the Small Business Administration and its Predecessor Agency

The decision below, if allowed to pass unreviewed by this Court, would undermine nearly three decades of consistent interpretation and application of § 637(b)(7)(A) of the Small Business Act and would frustrate the clear intent of Congress to eliminate implicit as well as explicit discrimination against small businesses in Government contracting. If such a departure from the clear meaning of the statute and its established legislative history is to take place in contravention of the long-standing interpretation of the agency charged with administering the Act, it should be done only after careful review by this Court.

The provision of the Small Business Act relied upon by Petitioner states:

> (b) It shall also be the duty of the [Small Business] Administration and it is empowered whenever it determines such action is necessary—

> (7) (A) To certify to Government Procurement officers, and officers engaged in the sale and disposal of Federal property, with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity, of any small business concern or group of such concerns to receive and perform a specific Government contract. *A Government procurement officer or an officer engaged in the sale and disposal of Federal property may not, for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the Administrator.*
>
> 15 U.S.C. § 637(b) (7) (A) (Supp. I 1977) (Emphasis added.)

It is Petitioner's contention that the Respondent's unilateral decision to bar it from bidding on the Lake Creek resale on the sole ground that Petitioner defaulted on the original contract was a determination that Petitioner was not a responsible bidder within the meaning of the Act, and that 15 U.S.C. § 637(b) (7) (A) plainly prohibits such a determination unless the matter is referred for final disposition to the Small Business Administrator.

In response to this argument, the Court of Claims below admitted that the language of the second sentence of 15 U.S.C. § 637(b) (7) (A) "is broad enough to cover the Forest Supervisor's barring of the [Petitioner] from bidding on the second contract" but then proceeded to ignore the plain meaning of the statute which the Court had just acknowledged and concluded that "the legislative history of the provision indicates that it was not intended to apply to this situation." Appendix A at 6a.

Section 637(b) (7) (A) unambiguously states that the Small Business Administration is empowered to certify *"all elements of responsibility"* of *"any small business concern or group of such concerns to receive and perform a specific Government contract."* (Emphasis added.) Sec-

tion 637(b)(7)(A) then states even more explicitly that a "*Government procurement officer or an officer engaged in the sale and disposal of Federal property may not for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for final disposition to the Administrator.*" (Emphasis added.)

There simply can be no doubt as to the all-inclusive meaning of this statutory language.

In light of the clarity of the statute itself, the Court of Claims resort to legislative history as an interpretative aid was inappropriate and without justification. This Court has frequently acknowledged that, "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete, except 'in rare and exceptional circumstances'". (Citations omitted) *Rubin* v. *United States*, —— U.S. ——, 1015 S. Ct. 698 (1981). Following this reasoning the Court of Claims has recognized that "a clear and unambiguous statute speaks for itself" (*Selman* v. *United States*, 204 Ct.Cl. 675, 680, 498 F.2d 1354, 1358 (1975)) and that a court should resort to "legislative history as an aid in construing an otherwise unambiguous statute *only* when such history offers 'clear and compelling support' for an interpretation different from that of the ordinary meaning of the law's words." *Id.*, 204 Ct.Cl. at 683, 498 F.2d at 1368. (Emphasis added.)

Notwithstanding that the Court of Claims' resort to legislative history was totally unwarranted in this case, it is apparent from even a brief review that the legislative history of the Act overwhelmingly supports the conclusion that Congress did not intend to exclude resale contracts from the coverage of Section 637(b)(7)(A). For example, the House Report on the 1977 amendment to the Small Business Act which expanded the SBA's Certificate of Competency program, specifically states that the Act is expanded to require that SBA make "the

final determination of *all elements of responsibility and eligibility of a small business for purposes of bidding on Government contracts.*" (Emphasis added.) H.R. Rep. No. 95-1, 95th Cong., 1st Sess. 2, *reprinted in* [1977] U.S. Cong. & Ad. News 821, 822; Appendix D at 19a.

Similarly, the section of the House Report entitled "What The Bill Would Do" states that the 1977 amendment authorizes SBA to make "*all determinations* regarding the responsibility of a small business concern to perform a specific Government contract." H.R. Rep. No. 95-1 at 18; Appendix D at 22a. (Emphasis added.) The term "responsibility" is specifically defined in the House Report to "*include all criteria presently used by procurement officers.*" The reference to "*all determinations regarding the responsibility of a small business concern*" and "*all criteria presently used by procurement officers*" is repeated in the Joint Explanatory Statement of the Committee of Conference. H.R. Rep. No. 95-535, 95th Cong., 1st Sess. 21, *reprinted in* [1977] U.S. Cong. & Ad. News 821, 851; Appendix E at 24a. (Emphasis added.) The decision below recognized that "the 1977 amendments [to the Small Business Act] were intended to give the administrator broader authority to determine whether small businesses seeking to participate in government contracts are responsible." Appendix A at 8a. Had Congress intended, as the decision below asserts, to exempt "the situation of the reletting of the contract after a small business firm had defaulted in performance" (Appendix A at 8a), it could easily have so stated in the Act. To imply this exemption without clear and compelling authority and in the face of such all-encompassing language constitutes nothing less than judicial usurpation of the legislative function. Such action calls strongly for supervisory review by this Court.

The only rationale advanced by the Court of Claims for its incredibly narrow interpretation of this admittedly broad and remedial statute is the conclusory state-

ment by the Court that the purpose of the Small Business Act COC procedures was limited to ending discrimination against small businesses in situations where "contracting officers had barred those businesses *solely* because of their smallness and disabilities allegedly resulting from that fact". Appendix A at 8a. By this the Court of Claims apparently means that the Act as amended in 1977 was intended by Congress to be limited to instances where smallness was explicitly stated by the contracting officer as the sole basis of a finding of nonresponsibility. However, the broad and all-encompassing language of the Act itself and of the legislative history of the 1977 Amendment, compels the contrary conclusion that it was Congress' intent to broaden the Act in 1977 to end all discrimination in Government contracting *implicit as well as explicit*, against small businesses because of their smallness by subjecting final disposition of *any* agency determination of nonresponsibility against a small business to the SBA.

To be sure, explicit discrimination on the basis of size may take place from time to time, but it is much more likely that discrimination against small businesses will manifest itself in a more subtle manner in which the smallness of the business is not specifically mentioned. The instant case in which Petitioner was barred from bidding on the resale on the stated ground of inability or unwillingness to perform purportedly based upon Petitioner's previous default provides a perfect example of such an opportunity for implicit discrimination. Congress was surely aware of the possibility of such disguised discrimination when in 1977 it amended the Small Business Act by adding the broadest possible language reserving final determination of "all elements of eligibility and responsibility" to the SBA. The unreasonably narrow reading of the Act by the decision below, if left

standing, would have the effect of repealing, at least in part, the 1977 Small Business Act Amendment.[7]

The decision below not only misconstrues the clear language of the Small Business Act as well as the equally clear legislative history of that Act but it is also in direct conflict with the long-standing interpretation and administration of the Act by the Small Business Administration. From the very beginning,[8] the Small Business Administration and its predecessor, the Small Defense Plants Administration, have interpretated the Act as applying to the situation of the reletting of the contract to a small business which had defaulted in performance on the original contract. The past policy and practice of these agencies charged with administering the Act is well documented in decisions of the United States District Court and the decisions of the Comptroller General discussed in more detail in Part II, pp. 12-15, *infra*.

Moreover, this administrative policy and practice of SBA continues today. *See, e.g.*, SBA COC No. 05-2117 (1979) (the appeal of a nonresponsibility determination by the Defense Personnel Support Center in a situation involving a previously defaulted small business) and SBA COC No. 05-2944 (1981) (involving the appeal

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[7] The Forest Service regulation barring plaintiff from participation in the Lake Creek resale excluded a defaulting purchaser regardless of size, but reserved the right of the Forest Service to allow any such defaulted purchaser to participate in the rebid, if, in its discretion, the Forest Service believed it was in the public interest to do so. This is the functional equivalent of the Forest Service reserving the right to decide, in its unreviewable discretion, (and *without providing any explanation or statement of reasons*) whether a defaulting purchaser may or may not be eligible for award of the contract.

[8] The legislative history of 15 U.S.C. § 637(b)(7)(A) is briefly outlined in the decision below, Appendix A, pp. 6a-8a.

of a similar determination by the Defense Construction Supply Center).[9]

Current SBA Standard Operating Procedures (S.O.P. 60-04-2, Appendix J), reinforce this well established policy and practice. On page 9 of S.O.P. 60-04-2 the SBA states that "one of the purposes of the COC procedure is to assist the applicant in becoming established, or *reestablished*, with Government procuring agencies." Appendix J at 58a. (Emphasis added.) Thus a small business contractor who has defaulted on a contract and seeks to "reestablish" his responsibility is currently entitled to the COC procedure as administered by SBA.

In defining the elements of responsibility under the COC procedures SBA notes that "[p]ast unsatisfactory performance, due to failure to apply the necessary tenacity or perseverance to do an acceptable job and which is not attributable to lack of capacity or credit renders a concern nonresponsible." Appendix J at 59a. Further, SBA states that "under the authority given in Section 8(b)(7) [§ 637(b)(7)] of the Small Business Act, [SBA] will issue or decline a Certificate of Competency (COC) *irrespective of the type of procurement* or the dollar value thereof." Appendix J at 14a. (Emphasis added.) As the SBA views it "[t]he COC program is, in effect, an appellate procedure." Appendix J at 58a.

This Court has frequently followed the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." (citations omitted) *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 (1969). The decision below erred in failing to adhere to this same principle.

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[9] These reference numbers identify COC proceedings pending before SBA at the time this Petition was written. SBA does not publish opinions in such proceedings.

II. The Decision Below is in Conflict with the Decision of the United States District Court, Affirmed by the Court of Appeals for the Fourth Circuit, and Decisions of the Comptroller General

The holding of the Court of Claims below that the Certificate of Competency requirements contained in the Small Business Act do not apply to a previously defaulted small business attempting to bid on the reletting of the original contract was adopted *sua sponte*, without discussion of or citation to any decisional authority and without the benefit of prior briefing by the parties. That holding is in conflict with the reasoning of virtually every other decisional authority which has had the opportunity to consider directly or indirectly this issue since the inception of the Small Business COC procedures in 1951. Such a conflict with a consistent parallel line of authority, unless resolved by this Court, will only spawn additional confusion and needless litigation in an already overburdened Federal court system.

The issue of the applicability of the SBA COC procedures to a defaulted small business was first addressed by the Federal courts in *United States* v. *Thompson*, 168 F.Supp. 281 (N.D.W.Va. 1958), *aff'd*, 268 F.2d 426 (4th Cir. 1959), Appendix G at 27a. There the District Court expressly recognized that the Small Defense Plants Administration Certificate of Competency procedures (the predecessor of the SBA COC procedures at issue in this case) were applicable to the reletting of a contract after a small business firm had defaulted in performance on that contract. In *Thompson* a contract for the manufacture and delivery of shaft assemblies for ships was awarded to a small business on March 8, 1949. 168 F.Supp. at 282, Appendix G at 28a. After receiving numerous extensions over a nearly three-year period, the small business contractor totally failed to meet any of the expected delivery dates and was terminated for default. 168 F.Supp. at 283-284, Appendix G at pp. 29a-32a. Following this termination the same contract was put out for bids

again, and the same small business contractor submitted the lowest bid but was disqualified by the Navy because of its earlier default. However, a request for a Certificate of Competency was submitted to the Small Defense Plants Administration (predecessor to the SBA) which issued a certificate of the defendant's competency as to capacity and credit. 168 F.Supp. at 289, Appendix G at 42a. The Court in *Thompson* ruled that "[i]t is quite true that the Navy must accept such certification as conclusive". Thus, the United States District Court expressly found that Certificate of Competency procedures (then limited to capacity and credit) applied and that the certification was conclusively binding upon an agency which refused to award a reprocurement contract to a small business firm because that firm had defaulted in performance on the original contract. The decision below squarely conflicts with this finding.

Because the exclusion of a small business from bidding occurs prior to award of the contract, the decisional authority which has had the most frequent opportunity to consider directly the issue raised in this Petition is the Comptroller General of the United States. The decisions of the Comptroller General have for some time held that SBA COC procedures apply with full force to a situation in which a small business which defaulted in performance on the original contract seeks to bid on the reletting of that contract.

For example, in 1966 the Comptroller General was presented with a situation very close to the instant case, *Linochine*, 45 Comp. Gen. 624 (1966). There the Navy refused to allow an incumbent small contractor to submit a bid on the follow-up contract because that small contractor defaulted on the initial procurement for the same item. The Comptroller General ruled:

> In the opinion of our office *contracting officers are without authority to utilize the procedure of deliberately neglecting to solicit an incumbent contrac-*

> *tor, who is known to be a small business, for an offer on a negotiated procurement as a means of enforcing a determination of nonresponsibility.* The countenancing of *such a procedure would tend to undermine the purposes behind section 8(b)(7) of the act of July 18, 1958, 72 Stat. 389, 15 U.S.C. 637(b)(7),* empowering the Administrator of the Small Business Administration to certify in a manner conclusive upon officers of the Government having procurement powers as to the capacity and credit of a small business concern to perform a specific Government contract . . . *The proper method for the contracting officer to have vindicated any doubts about Linochine's qualifications as a prospective contractor would have been to solicit the company for proposals in the first instance and then to* promulgate a determination of *nonresponsibility,* if such action were still deemed appropriate, during the evaluation period . . . *We cannot condone the practices followed on the two solicitations in point which in this case denied the company resort to statutory procedures created by Congress for the benefit of just such a small business as Linochine, and which gave the appearance of a boycott of the company's products.* [45 Comp. Gen. 642 at 643, 644. Appendix I at 54a. (Emphasis added.)

Similarly, in 1974 the Comptroller General ruled that "a deliberate failure to furnish a copy of the solicitation to an incumbent small business contractor on the basis that it lacked the capacity to perform was an improper and premature nonresponsibility determination." *Plattsburgh Laundry and Dry Cleaning Corp.* 54 Comp Gen. 30, 32 (1974). Citing 45 Comp. Gen. 642 (quoted at length above), the Comptroller General ruled:

> Where the incumbent is a small business concern—as here—we have held that such failure to solicit tends to undermine the purposes of 15 U.S.C. 637(b)(7), whereunder the Administrator of the Small Business Administration is empowered to conclusively certify to the capacity and credit of a

small business concern to perform a particular Government contract. [54 Comp. Gen. at 32, Appendix H at 50a.]

The foregoing decisions of the Comptroller General and the United States District Court, affirmed by the Fourth Circuit Court of Appeals, present a longstanding and well-reasoned line of authority in conflict with the decision below. This conflict should be resolved by review in this Court.

III. If Allowed To Stand, the Decision Below Would Create Inequitable and Irrational Exemptions From Standard SBA Procedures Potentially Affecting Large Numbers of Small Businesses

The decision below would create inequitable exemptions from standard SBA COC procedure which are applied to thousands of small companies seeking to do business with the Government every year.[10] If allowed to stand unreviewed by this Court, it would, in contravention of Congressional intent, deprive a substantial class of small business contractors of access to an unbiased forum in which they may establish or reestablish their reputation as responsible Government contractors.[11] For many of these small enterprises, access to such a forum could mean the difference between financial demise and continued existence.

The exemption from the COC procedure which would be created by the decision below is irrational as well as inequitable. The Court of Claims concluded that Petitioner had no right to an SBA final determination of its

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[10] For example, there were more than 2,600 COC small business referrals by Government agencies to SBA in fiscal 1981 alone. SBA, Management Information Survey, RCN 309 (September, 1981).

[11] The decision below is by no means limited to Forest Service timber sales. Any Government agency may adopt a regulation similar to 36 CFR 223.5(h)(1) (Appendix F at 26a) and thereby retain the unreviewable discretion to preclude a previously defaulted small business from participating in the reletting of a contract.

alleged nonresponsibility. However, under the reasoning of the opinion below, on the very same day that Petitioner could have been barred from bidding on the Lake Creek resale it could not have been barred from bidding on any other Forest Service timber sale or resale on grounds of its poor performance on the Lake Creek sale without a final determination of responsibility by SBA.[12]

There is no justification under the Small Business Act for such an inequitable and irrational distinction. Review by this Court is required so that these and other serious policy implications may be adequately considered and the decision below modified accordingly.

CONCLUSION

For each of the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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[12] With the exception of the situation at issue in this case, *i.e.*, where a contractor which defaulted on the original contract seeks to participate in the resale, there is no dispute as to the absolute right of a small business bidder to avail itself of the COC procedures on any Forest Service timber sale or resale.

Appendix

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 185-79C

(Decided June 17, 1981)

SILLER BROTHERS, INCORPORATED

v.

THE UNITED STATES

Alan I. Saltman, attorney of record, for plaintiff, *Saltman & Stevens, P.C., Lyle D. Gisi, Offutt, Coolidge & Gisi*, and *Joseph J. Petrillo*, of counsel.

Marsha D. Peterson, with whom was *Acting Assistant Attorney General Thomas S. Martin*, for defendant.

Before FRIEDMAN, *Chief Judge*, BENNETT and SMITH, *Judges*.

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

FRIEDMAN, *Chief Judge*, delivered the opinion of the court:

The principal issue in this case, which is before us on cross-motions for summary judgment, is whether the government validly barred the plaintiff from rebidding on a contract to cut timber in a national forest, because of

the plaintiff's failure to cut any timber during the 3-year term of the prior contract that had been awarded to the plaintiff. The plaintiff also contends that the government did not adequately attempt to mitigate damages and that it improperly calculated damages on the resale. We hold for the defendant on all issues.

I.

In 1974, the Forest Supervisor of the Bighorn National Forest in Wyoming invited bids for the sale of standing timber there. The contract was to cover the cutting and sale of 3,390 MBF (thousand board feet) of timber, and the invitation specified a minimum bid of $56.66 per MBF. The successful bidder also would be required to build about 8.96 miles of road. The plaintiff and Wyoming Sawmills, Inc., were the only bidders. An oral auction was then held, at which the plaintiff was awarded the contract on its bid of $100 per MBF.

The contract, awarded in August 1974, was for a 3-year term ending September 30, 1977. At the end of the term the plaintiff had not felled a single tree. It had constructed 5.86 miles of road for which it earned a "purchaser credit" of $92,869.80 which, under the contract, was to be applied to reduce the plaintiff's payment for the timber it cut. The plaintiff also had paid a deposit of $6,233 when it received the contract.

Following the termination of the contract, the Forest Supervisor, in October 1977, notified plaintiff that the government would assess damages against it, that the timber would be readvertised for sale, and that, pursuant to a cited regulation, the plaintiff would not be permitted to bid for the reoffered timber.

The government circulated the announcement of the reopening of the timber to a bidder list which included 19 persons. The announcement showed that the plaintiff had been removed from the eligible list. The minimum

bid price was $80.37 per MBF, which was $23.71 more than the minimum bid for the earlier sale.

Plaintiff twice requested the Forest Supervisor to permit it to bid. In its final request, made the Friday before the Monday bid opening, the plaintiff stated that the regulation the Forest Service had relied upon had been changed. The Forest Supervisor reviewed the new regulation, and again denied plaintiff the opportunity to bid.

When the bids were opened in January 1978, only Wyoming Sawmills submitted a bid. It bid $80.42 or 5 cents above the minimum. Since there was only one bid, no auction was held, and the contract was awarded to Wyoming Sawmills at that price.

In the present suit the plaintiff seeks $99,102.80, reflecting its purchaser credit of $92,869.80 for the construction of the roads and the $6,233 deposit it made when it received the original contract in 1974. The government has filed a counterclaim for $45,772.15, covering its damages for the plaintiff's failure to perform the contract (*see infra*, pp. 10-11.)

II.

In seeking recovery of its purchaser credit and deposit, the plaintiff contends that in barring it from rebidding, the Forest Supervisor violated both the regulations of the Forest Service and the Small Business Act, and that the government therefore improperly retained those amounts to use as an offset against the loss if suffered on the relet contract (*see infra*, p. 7).

A. The regulation upon which the plaintiff relies states:

> Except as otherwise provided in this section, no bid will be considered in the resale of timber remaining from any uncompleted timber sale contract from any person, or from an affiliate of such person,

> who failed to complete the original contract (i) because of termination for purchaser's branch [sic] or (ii) through failure to cut designated timber or portions of the sale area by the termination date, *unless acceptance of such bid is determined to be in the public interest.*

36 C.F.R. § 223.5(h)(1) (emphasis added) (italicized portion added effective June 2, 1977).

The plaintiff first points out that when the Forest Supervisor informed it in 1977 that it would not be allowed to bid on the reletting of the contract, he referred to an earlier version of the regulation that did not contain the italicized language above. In its second request to rebid, however, the plaintiff referred to the changed regulation, and the Forest Supervisor reviewed the current version when he continued to refuse to allow the plaintiff to rebid. The Forest Supervisor thus considered the plaintiff's request under the revised regulation.

The plaintiff's major argument is that under the regulation the Forest Service was required to, but did not determine whether acceptance of the plaintiff's bid would be in the public interest and that without such determination the Forest Supervisor's refusal to allow the plaintiff to bid was improper. We do not interpret the regulation to require a formal public interest determination. The regulation bars a defaulting contractor from rebidding a resale under a timber contract, but authorizes the Forest Service to allow it to rebid if the Service determines that awarding it the contract would be in the public interest. The refusal of the Forest Supervisor to permit the plaintiff to rebid was an implicit determination that awarding the plaintiff the contract would not be in the public interest. The regulation required no more.

Everett Plywood Corp. v. *United States*, 206 Ct. Cl. 244, 512 F.2d 1082 (1975), upon which the plaintiff relies, is inapplicable. That case involved the Forest Service's refusal to extend the term of a timber-cutting contract. The Forest Service had a regulation under which it routinely granted extensions of timber-cutting contracts upon request unless the extension would be "disadvantageous to the United States." We held that the Forest Service had violated that provision since it denied the extension not because it concluded that the extension would be disadvantageous to the United States, but under a "standard entirely different from that theretofore applied by the Forest Service" (namely, whether the reasons the plaintiff gave for an extension "amounted to extraordinary conditions"). 206 Ct. Cl. at 257, 512 F.2d at 1090. In other words, we held that the Forest Service had deviated from its own regulations.

In the present case, in contrast, we construe the rebidding regulation as barring a defaulting contractor from rebidding unless the Forest Service determines that awarding it the contract would be in the public interest. Here, unlike *Everett Plywood*, there is no indication that the Forest Service did not act in conformity with the regulations. Indeed, since the plaintiff had not cut a single foot of timber during the 3-year term of the contract, the Forest Service had no reason to think that the plaintiff would behave any better if it were awarded a second contract to cut the same timber. In these circumstances, the Forest Service was fully warranted in not determining that allowing the plaintiff to bid on the second contract would be in the public interest.

B. The provision of the Small Business Act, upon which the plaintiff relies, states as follows:

> (b) It shall also be the duty of the [Small Business] Administration and it is empowered whenever it determines such action is necessary—
>
> . . .

> (7) (A) To certify to Government procurement officers, and officers engaged in the sale and disposal of Federal property, with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity, of any small business concern or group of such concerns to receive and perform a specific Government contract. A Government procurement officer or an officer engaged in the sale and disposal of Federal property may not, for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the Administrator.

15 U.S.C. § 637(b) (7) (A) (Supp. I 1977).

The plaintiff contends that the Forest Supervisor's decision to bar it from bidding on the second contract was a determination that the plaintiff was not a responsible bidder, and that under section 637(b) (7) (A) the Small Business Administrator had exclusive authority to make all determinations concerning the "responsibility" of bidders who are small business men. The plaintiff had filed an affidavit, which the government had not controverted, that it is a small business concern under the Act.

Although the language of the second sentence of the section is broad enough to cover the Forest Supervisor's barring of the plaintiff from bidding on the second contract, the legislative history of the provision indicates that it was not intended to apply in this situation.

Section 637(b) (7) (A) had its genesis in the Defense Production Act Amendments of 1951, Pub. L. No. 96, § 714(e) (6), 65 Stat. 131 (1951). Those amendments created the small Defense Plants Administration and au-

thorized it to certify the capacity and credit of small businesses. The House Report accompanying the 1951 amendments explained the reasons for this action:

> (a) Small business has been unable to obtain a fair share of defense contracts.—This is a problem of business life or death to thousands of small manufacturing concerns which have been unable to obtain materials to continue in civilian production. Of course, the path of least resistance is that of loading defense contracts on to large corporations and allowing small business to fall by the wayside. This is the path which was followed in the early days of World War II, when 100 large corporations received 67 percent of prime contracts. During this same period, one-sixth of the small businesses in the Nation closed their doors.
>
> This mistake must not be repeated. Our mobilization program must extend down into the small plants, since they are a major source of our productive strength. The proposed amendment [subsequently enacted] would accomplish this by creating a Small Defense Plants Corporation with authority to certify qualified small businesses for prime contracts. Procurement officers would be directed to accept this authorization as conclusive. This provision would give small businesses definite assurance of a fair share of prime contracts.

H.R. REP. No. 639, 82d Cong., 1st Sess. 31, *reprinted in* [1951] U.S. CODE CONG. & AD. NEWS 1626, 1645-46.

The Small Business Act of 1958, Pub. L. No. 85-536 § 8(b)(7), 72 Stat. 384 (1958), expanded this provision to cover all government procurement and sales, not just defense contracts. The provision took the form of the present section 637(b)(7)(A) except that the reference to the administrator and the administrator's certifying authority were limited to questions "with respect to the

competency, as to capacity and credit, of any small-business concern or group."

The Small Business Act was amended in 1977 to broaden to its present form the concept of "responsibility" for which the administrator was to certify small businesses. The House Report on the amendment explains the congressional concern:

> Small business can and has been denied Government contracts because the procuring activity has determined that the small business lacked the requisite "tenacity, perseverance or integrity" to perform a specific Government contract. Such a finding results in the small firm being branded "nonresponsible". Resort to the ["Certificate of Competency"] procedure in such cases is not available since capacity and credit are, purportedly, not involved.

H.R. REP. NO. 95-1, 95th Cong., 1st Sess. 13, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 821, 833. *See also* S. REP. NO. 95-184, 95th Cong., 1st Sess. 7-8 (1977).

Although the 1977 amendments were intended to give the administrator broader authority to determine whether small businesses seeking to participate in government contracts are responsible, we conclude that the provision does not apply to the Forest Service's refusal to permit the plaintiff to bid on the second timber contract. The purpose of this provision, as reflected in the legislative history of its predecessors, was to end the discrimination against small business that existed because contracting officers had barred those businesses solely because of their smallness and disabilities allegedly resulting from that fact. There is no indication, however, that Congress also intended to cover the situation of the reletting of the contract after a small business firm had defaulted in performance.

The Forest Service regulation does not discriminate against small businesses but generally bars all default-

ing contractors from bidding upon the reletting of the contract. The Forest Supervisor refused to allow the plaintiff to participate in rebidding, not because of alleged deficiencies stemming from its size, but because of its failure to cut any timber under the prior contract. The result would have been the same if the plaintiff had not been a small business. In the special circumstances of this case—where the plaintiff had not cut a single foot of timber under the contract for 3 years—section 637(b)(7)(A) of the Small Business Act did not require the Forest Supervisor to refer the matter to the administrator before he could bar the plaintiff from participating in the rebidding of the contract.

III.

The plaintiff opposes the government's counterclaim covering the losses the government suffered when it relet the contract for a lower amount than the contract with the plaintiff would have produced on the ground that the government failed adequately to mitigate its damages. The argument has two branches: (A) By excluding the plaintiff from rebidding, the government lost the higher price it would have obtained at a second auction; (B) because the second contract was a "sole source" situation, the government should have attempted to negotiate a higher price with Wyoming Sawmills than the minimum price the latter bid.

A. 1. Our conclusion in part II that the government justifiably excluded the plaintiff from rebidding also refutes the plaintiff's argument that the exclusion constituted a failure to mitigate damages. It would be anomalous to hold that the government property barred the plaintiff from rebidding but that by taking such action the government violated its obligation to mitigate damages. Indeed, it would have been improper for the government to have permitted the plaintiff to bid on the relet contract where the government would not have

awarded the contract to the plaintiff if the latter had been the high bidder. Permitting the plaintiff to bid in that circumstance would have been grossly unfair to Wyoming Sawmills, which would have had to pay a higher price as a consequence of an artificial and misleading auction procedure. Having been disqualified by totally breaching the first contract, the plaintiff now cannot properly complain because its exclusion from bidding on the second contract may have increased the damages it must pay for its breach of the earlier one.

2. We recently recognized that the government's duty to mitigate damages does not necessarily require, although it may authorize, the government to permit a defaulted contractor to bid on the reprocurement (and, by the same reasoning on the reletting of a sales contract). In *Venice Maid Company, Inc.* v. *United States*, 225 Ct. Cl. ——, ——, 639 F.2d 690, 697 (1980), in ruling that the government had not failed to mitigate damages by not awarding a contract to the defaulting contractor on the reprocurement, we stated that a defaulting contractor "*may* be considered for award of the reprocurement contract" (emphasis in original). *See also Churchill Chemical Corp.* v. *United States*, 221 Ct. Cl. ——, ——, 602 F.2d 358, 363 (1979). The Armed Services Board of Contract Appeals similarly has stated that

> [i]n some circumstances the reasons for the default may be such as not to indicate an inability on the part of the defaulted contractor to perform the reprocurement contract, in which event there may be an implied duty on the part of the Government to permit the defaulted contractor to bid on the reprocurement so as to permit him to mitigate his damages.

Woodrow P. Hudson d/b/a San Diego Concrete Disposal, ASBCA No. 21,044, 76-2 BCA (CCH) ¶ 12,182 (1976). *See also Venice Maid Company, Inc.*, ASBCA Nos. 20,546, 20,792, 76-2 BCA (CCH) ¶ 12,045 (1976).

The Comptroller General has ruled that "once the contracting officer decides that it is appropriate to conduct a new competition for reprocurement, he may not automatically exclude the defaulted contractor from that competition." *PRB Uniforms, Inc.*, 56 Comp. Gen. 976, 978 (1977). *See also Ikard Manufacturing Co.*, 58 Comp. Gen. 54, 57 (1978). Since the Forest Service's regulation permits a defaulting contractor to rebid if the Service determines that acceptance of his bid would be in the public interest, the Comptroller General might uphold the exclusion of the plaintiff from rebidding in this case. *But cf.* Unpublished Comptroller General Decision No. B-195497 (June 2, 1980), which recommends that the Forest Service "consider revising [this] regulation" because the Comptroller General "do[es] not believe automatic disqualification of a defaulted timber purchaser insures open and fair competition." In any event, we conclude that in refusing to permit the plaintiff to participate in the rebidding, the government did not violate its obligation to mitigate damages.

B. The plaintiff contends that when, upon opening of the bids at the reletting, the Forest Supervisor discovered that only Wyoming Sawmills had bid, he should have attempted to negotiate a higher price with the bidder instead of accepting the bid and that his non-negotiation constituted a failure to mitigate damages. It urges that the Forest Service should have treated the case as a "sole source" situation, in which the government is not required to accept whatever offer the prospective contractor makes.

The sole source concept, however, relates mainly to procurement, not to sales. *See, e.g.*, 10 U.S.C. § 2304 (1976); 41 U.S.C. § 252(c) (1976). *See generally* 1B J. McBride & T. Touney, Government Contracts, ch. 9 (1981). It involves a situation where the government does not seek bids or invitations from more than one source, but instead decides to negotiate with only one person. Fur-

thermore, a negotiated contract must be authorized by statute. *New York Mail and Newspaper Transportation Co.* v. *United States*, 139 Ct. Cl. 751, 757, 154 F. Supp. 271, 275, *cert. denied*, 355 U.S. 904 (1957). Even assuming that the same principle would apply to sales of government property and that a statute permits sale by negotiation, under the facts here this was not a sole source arrangement.

The Forest Service sent invitations to bid on the reletting of the contract to 19 concerns, 11 of which were located in Wyoming. It also advertised the sale in a local newspaper, The Sheridan (Wyoming) Press. The fact that only a single bid was submitted did not convert this advertised and solicited bidding procedure into a sole source arrangement.

Wyoming Sawmills' bid slightly exceeded the minimum bid the government specified in the advertisement. Implicit in setting a minimum bid is the understanding that the government is willing to and will make the sale at that price. The plaintiff points out that the selling price under the second contract dropped from $100 MBF in the first contract to $80.42 MBF, "in spite of an apparent rise in the market price of timber sold." What the plaintiff overlooks, however, is that the minimum bid of $80.37 for the second contract was $23.71 higher than the minimum bid of $56.66 for the same timber under the first contract. This significantly higher minimum bid price under the second contract presumably reflected the increase in timber prices since the first contract was let and the higher price for the first contract that the auction had produced.

The regulations governing the sale of standing timber do not provide for negotiation but only for advertising and bidding. 36 C.F.R. § 223.5(a). The Forest Supervisor did not act improperly or fail to mitigate damages in accepting the only bid he received at a price that exceeded the minimum.

IV.

The damages of $45,772.15 that the government assessed against the plaintiff—the subject of the counterclaim—were computed as follows:

The amount the government would have received if the plaintiff had performed the contract, based on the contract price of the timber at the time of termination (September 30, 1977) of $122.26 per MBF. This price represented the initial contract price of $100 with quarterly adjustments pursuant to the contract to reflect changes in a timber price index:	$414,461.40
Plus Cost of Resale:	3,037.35
Total	417,498.75
Less Purchaser Credit (earned from building the road):	92,869.80
	324,628.95
Less the amount bid by Wyoming Sawmills at the resale ($80.42 per MBF):	272,623.80
Total damages	52,005.15
Less Deposit on Sale held by the Forest Service:	6,233.00
Total Damages	$45,772.15

The plaintiff contends that in calculating damages the government should have escalated not only the $100 contract price, but also the $80.42 price under the rebid contract, to reflect the amounts Wyoming Sawmills actually paid.

The contract specifies the measures of damages if the contractor defaults and the timber is resold.

Paragraph B9.4 states:

> Damages due the United States for Purchaser's failure to cut and remove such timber meeting Utilization Standards shall be the amount by which Current Contract Value plus the cost of resale, less any effective Purchase Credit remaining at the time of termination, exceeds the resale value at new Bid Rates.

The "Current Contract Value" is defined as the "sum of the products of Current Contract Rates and estimated remaining . . . [t]imber." Paragraph B3.1. "Current Contract Rates" are the "Tentative Rates," which consist of the minimum bid prices (the "Advertised Rates") plus the amount by which the contract price exceeds the minimum ("Bid Premium Rates"), to which is added any quarterly price escalation. Paragraphs A5, B3.1. Since no timber was cut in the present case, the "Current Contract Value" is the same as the "Current Contract Rates" multiplied by the amount of timber to be cut under the contract. The "Current Contract Value" when the contract was terminated on September 30, 1977, was $414,461.40, based upon the then "Current Contract Rate" of $122.26 per MBF multiplied by the 3,390 MBF of timber to be cut.

The issue in dispute is the meaning of the words "the resale value at new Bid Rates" in paragraph B9.4, which is to be subtracted from the "Current Contract Value" in determining damages. "Bid Rates" are defined as "the rates bid by Purchaser . . . and are the sum of Advertised Rates and Bid Premium Rates. Until a rate redetermination becomes effective, the Bid Rate [here applicable] . . . is the Tentative Rate which is subject to quarterly adjustment . . . ." Paragraph A5.

As indicated, the "Advertised Rate" is the minimum bid and the "Bid Premium Rate" is the difference between that minimum rate and the price at which the contract was let. The "new Bid Rate" for the resale of the timber to Wyoming Sawmills was the minimum price of

$80.37 specified in the invitation plus the 5 cents additio[illegible] that Wyoming Sawmills bid. The government determined that the "resale value at new Bid Rates" was $272,638.80 ($80.42 x 3,390), which was the amount the government subtracted from the Current Contract Value of $414,461.40.

When the contract speaks of the resale value at "new Bid Rates," we think it refers to the specific price at which the new conract was let and not to any escalation of that price during the period of performance. The "Bid Rates" are defined as the "rates bid by Purchaser." The rate Wyoming Sawmills bid was $80.42, not the amounts by which this bid subsequently was escalated. Although that rate was subject to quarterly adjustment, there is no indication in the contract that if the contractor defaulted and the government resold the timber, the government's damages were to be calculated upon the escalated rate rather than upon the rate the new contractor bid. When the contract refers to escalated rates, it uses the term "Current Contract Rate," not "Bid Rates." We therefore conclude that the government correctly calculated the damages.

CONCLUSION

The plaintiff's motion for summary judgment is denied, and the defendant's motion for summary judgment is granted. The petition is dismissed. The defendant is entitled to recovery of $45,772.15 on its counterclaim, and judgment in that amount is entered for it against the plaintiff.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS
October 2, 1981

ORDER

PER CURIAM: IT IS ORDERED that the motions of the parties, as set forth below, for rehearing *en banc*, rehearing, reconsideration, to alter, amend or vacate judgments and orders of the court and relief therefrom, or for other relief pursuant to Rules 7(d), 151(b) and 152 are DENIED:

* * * *

185-79C SILLER BROTHERS, INC.

Plaintiff's suggestion for rehearing *en banc* (By the SEVEN ACTIVE JUDGES of the court) and plaintiff's motion for rehearing, filed June 30, 1981. (By FRIEDMAN, *Chief Judge*, BENNETT and SMITH, *Judges*) [Opinion of June 17, 1981]

APPENDIX C

The Small Business Act, 15 U.S.C. § 637(b)(7)(A) (Supp. I 1977)

> (b) It shall also be the duty of the Administration and it is hereby empowered, whenever it determines such action is necessary—
>
> * * * *
>
> (7)(A) to certify to Government procurement officers, and officers engaged in the sale and disposal of Federal property, with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity, of any small business concern or group of such concerns to receive and perform a specific Government contract. A Government procurement officer or an officer engaged in the sale and disposal of Federal property may not, for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the Administration.
>
> * * * *
>
> (As amended Aug. 4, 1977, P.L. 95-89, Title V, § 501, 91 Stat. 561 . . . .)

APPENDIX D

House Report (Small Business Committee) No. 95-1, 95th Cong., 1st Sess. (January 27, 1977)*

[page 1]

The Committee on Small Business, to whom was referred the bill (H.R. 692) to amend the Small Business Act and the Small Business Investment Act of 1958 to increase loan authorization and surety bond guarantee authority; and to improve the disaster assistance, certificate of competency and Small Business set-aside programs, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

THE PURPOSE OF THE BILL

The bill, H.R. 692, is divided into 6 Titles, all of which were extensively studied by your Committee.

Title I of the bill increases SBA's authorizations and limitations for fiscal year 1977 as needed and establishes operating levels for all of SBA's programs for fiscal years 1978 and 1979.

Title II of the bill makes miscellaneous conforming and technical amendments to the Small Business Act and the Small Business Investment Act of 1958.

Title III of the bill authorizes SBA to provide financial assistance to small homebuilders; enlarges the eligibility for SBA compliance loans; and authorizes up to a 5-year moratorium on repayment of SBA loans.

Title IV of the bill authorizes SBA to make displaced business loans to a small concern which has been displaced by a project by a State or local gov-

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* *Reprinted in* [1977] U.S. Cong. & Ad. News 821 *et seq.*

ernment; and authorizes SBA to make economic injury loans to small business concerns in an area affected by a natural disaster upon the request of the Governor of the State involved.

[page 2]

Title V of the bill expands SBA's certificate of competency program by including the final determination of all elements of responsibility and eligibility of a small business for purposes of bidding on Government contracts.

Title VI of the bill directs Federal agencies, to the extent feasible, to divide small business set-aside contracts into amounts of less than $1,000,000 each.

* * * *

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TITLE V—CERTIFICATE OF COMPETENCY

Section 8(b)(7) of the Small Business Act authorizes the Small Business Administration to issue a "Certificate of Competency" (COC). This document "certifies to a Federal procuring activity that a small business concern is competent as to capacity and credit to perform a specific Government contract. Whenever any question arises as to the capacity and credit of such small business concern, the Government procurement officer refers the matter to the Small Business Administration, and its subsequent decision on the matter is conclusive. However, once the COC is issued, the contracting officer is merely "authorized" to let the contract. There is, at present, no statutory requirement mandating that once a COC is issued the contract must be let to the small business, nor does the statute include other elements aside from a small business's capacity or credit. This has resulted in severe problems for the small business community.

Small business can and has been denied Government contracts because the procuring activity has determined that the small business lacked the requisite "tenacity, perseverance or integrity" to perform a specific Government contract. Such a finding results in the small firm being branded as "nonresponsible." Resort to the COC procedure in such cases is not available since capacity and credit are, purportedly, not involved. Although SBA normally has the right to appeal such determinations to a higher authority within the procuring activity, such action is of questionable value as there is an inherent difficulty in asking a bureaucracy to overrule itself. Also, the procurement need not be held in abeyance pending the appeal if the contracting officer subjectively determines that the items called for by the contract are urgently needed.

There is yet another instance when procurement officers need not refer a matter to SBA for a COC determination, which is working an inequity on small business.

Aside from meeting those elements of "responsibility," a bidder on a Government contract must also show that it is "eligible" to receive a contract award. One element of eligibility is the requirement that all potential contractors must meet the criteria found in the Walsh-Healey Public Contracts Act, 41 U.S.C. § 35 *et seq.*

Section 1 of that Act requires that in all Government contracts in excess of $10,000 there must be a stipulation "that the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract." Rules and regulations of the Department of Labor require that a procurement officer must reject bids from a bidder who is not a "manufacturer or dealer" within the meaning of the statute. If a small business is deemed in-

eligible due to this provision of the Walsh-Healey Act, there is no recourse to the COC procedure. The small business does have the right to appeal the determination to the Department of Labor. However, your Committee is not aware of any case in which

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the Department of Labor has reversed a finding of ineligibility made pursuant to this Act.

Hearings conducted during June 1975 by the Subcommittee on Government Procurement and International Trade and a recent General Accounting Office investigation strongly establishes the fact that the Walsh-Healey Act is being misused to the detriment of the small business community.

The Department of Labor has issued letter opinions and memoranda which state that in order for a business to qualify as a manufacturer or dealer, the following analysis must be made by procurement officers:

> The determination must rest on whether the bidder has demonstrated in the past, or could reasonably be said to have in the future with the facilities at its disposal, an independent ability to perform on the contract by *fabricating alone* the item called for by the Government. (Emphasis supplied.)

The application of this ruling varies widely in different areas of the country. Bidders who would be eligible in one area are declared ineligible in another. For example, a bidder was declared ineligible because he did not manufacture the pencils to be included in a kit which was to be supplied to the Government.

Another illustration of this problem is in the procurement of formaldehyde. This product is only manufactured by 3 or 4 companies in the United States.

The Government purchases it in small containers. Literally applying this law, would prevent the Government from purchasing this product from any company except those large ones which actually manufacture it. Obviously this is not the intent of the law nor would it serve the interests of bidders or the Government.

The literal implementation of this requirement would exclude such corporate giants as General Motors or Rockwell International from receiving Government contracts. Very few firms produce every integral part that goes into the finished product. But this test is being applied most harshly to small business. The Defense Contract Administration Services has used this test on numerous occasions when conducting its pre-award surveys on potential Government contractors. When low bidders are declared ineligible because of this inequitable application of a good law, the Government pays more for its products, and small business is unjustly denied an opportunity to perform on Federal contracts.

* * * *

[page 15]

WHAT THE BILL WOULD DO

* * * *

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TITLE V—CERTIFICATE OF COMPETENCY

Title V of this bill would authorize the SBA to make all determinations regarding the responsibility of a small business concern to perform a specific Government contract. The term "responsibility" would include all criteria presently used by procurement officers. The title also provides that a contract may not be withheld for any such reason without referring the matter to SBA for a determination. This title

further provides that if the procurement officer believes that an otherwise qualified concern is in violation of the Walsh-Healey Act, this finding must be referred to SBA which would be given the authority to either dismiss the finding and direct the officer to award the contract, or if it concurs, submit the finding to the Department of Labor for final disposition. It does not, however, in any way change the requirements of this Act; it merely provides for a more uniform application of them in all areas of the United States.

Finally, whenever SBA issues its Certificate of Competency, it would be deemed as conclusive, and the contract must be awarded.

* * * *

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SECTION-BY-SECTION ANALYSIS

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TITLE V. CERTIFICATE OF COMPETENCY

Section 501 of the bill amends section 8(b) of the Small Business Act to expand the SBA's certificate of competency program by including within SBA jurisdiction final determination of all elements of eligibility and responsibility, specifically including the determination of whether a small business concern bidding on a Government contract is ineligible as a broker or whether he is eligible as a manufacturer or regular dealer under the Walsh-Healey Act. This section does not in any way change the requirements of Walsh-Healey, it merely provides for a uniform application of the Act in all regions of the United States.

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APPENDIX E

House Conference Report No. 95-535, 95th Cong., 1st Sess. (July 26, 1977)*

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JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 692) to amend the Small Business Act and the Small Business Investment Act of 1958 to increase loan authorization and surety bond guarantee authority; and to improve the disaster assistance, certificate of competency and Small Business set-aside programs, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment struck out all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment which is a substitute for the House bill and the Senate amendment. The principal differences among the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

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* *Reprinted in* [1977] U.S. Cong. & Ad. News 843 *et seq.*

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(14) CERTIFICATE OF COMPETENCY

The House bill authorizes the SBA to make all determinations regarding the responsibility of a small business concern to perform a specific Government contract. The term "responsibility" would include all criteria presently used by procurement officers. The bill also provides that a contract may not be withheld for any such reason without referring the matter to SBA for a determination. In addition, if the procurement officer believes that an otherwise qualified concern is in violation of the Walsh-Healey Act, this finding must be referred to SBA which is given the authority to either dismiss the finding and direct the officer to award the contract, or if concurs, submit the finding to the Department of Labor for final disposition. It does not, however, in any way change the requirements of this Act; it merely provides for their more uniform application in all areas of the United States.

Finally, the House bill provides that whenever SBA issues its Certificate of Competency, it shall be deemed conclusive and the contract awarded.

The Senate bill contains similar provisions except that it does not cover determinations of ineligibility under the Walsh-Healey Act.

The conference substitute adopts the House provisions.

In agreeing to the House-passed version of amendments to section 8(b) (7) of the Small Business Act, the Conferees do so with the understanding that the Small Business Administration shall conscientiously administer and enforce the rules and regulations promulgated by the Department of Labor that pertain to the Walsh-Healey Public Contracts Act when certifying as to whether a small business concern meets the provisions of section 35(a) of title 41, United States Code.

APPENDIX F

36 C.F.R. § 223.5(h) (1977)

> (1) Except as otherwise provided in this section, no bid will be considered in the resale of timber remaining from any uncompleted timber sale contract from any person, or from an affiliate of such person, who failed to complete the original contract (i) because of termination for purchaser's branch [sic] or (ii) through failure to cut designated timber on portions of the sale area by the termination date, unless acceptance of such bid is determined to be in the public interest.

[42 F.R.28252, June 2, 1977]

APPENDIX G

UNITED STATES DISTRICT COURT
N. D. West Virginia
at Wheeling

Civ. A. No. 760-W

UNITED STATES OF AMERICA,
Plaintiff,

v.

LOREN E. THOMPSON, doing business as
PARKERSBURG DIE & TOOL COMPANY,
Defendant.

Dec. 12, 1958

Albert M. Morgan, U. S. Atty., R. J. Schleuss, Asst. U.S. Atty., Fairmont, W. Va., for plaintiff.

Robert Evans Stealey, Lawrence M. Ronning, Parkersburg, W. Va., for defendant.

BOREMAN, District Judge.

This is an action instituted by the United States of America against Loren E. Thompson, doing business as Parkersburg Die & Tool Company, of Parkersburg, West Virginia, for damages caused by the defendant's non-performance of certain contracts with the government.

Four separate contracts are in issue, one for the United States Navy and three for the Army Corps of Engineers, each of which was entered into by the defendant and the particular service agency concerned as a result of invitations for bids, the defendant being the successful bidder and being awarded each contract. Upon declaration of default and termination of each contract, the plaintiff readvertised and awarded replacement contracts for the

articles involved and brought this action for the excess costs incurred by the plaintiff in obtaining the articles from other suppliers.

The suit was tried to the Court in lieu of a jury, and at the trial no evidence was introduced by the defendant in defense of Counts II, III and IV, the three Army contracts. In fact, the only issue as to these contracts raised by the defendant was an item of damage claimed by the plaintiff in Count IV as arising from a difference in certain material used by the replacement contractors.

However, as to Count I, involving the Navy contract, the several theories of defense are as follows: (1) That the defendant was not in default in the performance of the contract when the plaintiff terminated it; (2) that the plaintiff is estopped by its conduct from asserting a breach of contract on the part of the defendant; (3) that the plaintiff waived performance of the contract by the defendant according to its terms; and (4) that even if the defendant was in default, the plaintiff did not have the right to terminate the contract, under the provisions of Section 11(f) of the contract. Count I. The Navy Contract NObs 47684.

On March 8, 1949, the United States Navy Bureau of Ships awarded the defendant a contract, the subject of Count I of the complaint herein, for the manufacture and delivery by the defendant of three stern tube shaft assemblies for ships known as tenders, only two of which are involved in this litigation. This contract provided for delivery by the defendant within 190 days at a price for the two subject shaft assemblies of $11,991.30 each, or a total for the two shafts of $23,982.60.

At the time the defendant bid for and entered into the contract, he knew that he would not be able to manufacture the shaft assemblies and complete them for delivery in his shop in Parkersburg, and that he would require the services of a subcontractor to machine and bore the shaft

forgings. Notwithstanding this, the defendant did not undertake to even order this work from a subcontractor until August 12, 1949, more than five months after the date of the contract and only slightly more than one month before the finished article was to be delivered under the terms of the contract. On that date, the defendant placed his order with Barium Steel and Forge Company (now called Industrial Forge and Steel Company), of Canton, Ohio, for the necessary preliminary work. Under the subcontract, the supplier, Industrial Forge, was to purchase the required ingots and to forge, hollow bore, and rough machine the shafts in its plant at Canton, as the defendant's shop in Parkersburg was not equipped to do this work. After completion of this work by Industrial Forge, the defendant planned to finish and attach certain appurtenances to the shafts at his Parkersburg shop. However, there was no definite date set for completion of the work by Industrial. In fact, the work order by the defendant was not confirmed by Industrial until November 14, 1950.

Upon questioning by the Court, the defendant frankly stated that when he took the contract with the Bureau of Ships he knew that he would not be able to perform within the original time limits specified in the contract, but was counting on extensions, the granting of which the defendant seemed to regard as a customary practice with the government, or, at least, with the Navy.

On October 9, 1949, the defendant requested and was granted a 90-day extension of delivery date. Then on May 1, 1950, five months after the first extension had expired, the defendant requested and was granted a further extension of 120 to 150 days, or until September 30, 1950.

The plaintiff, by J. C. Marley, a contracting officer for the Bureau of Ships, by letter dated August 22, 1950, requested a detailed report on the progress being made under the contract and a stipulation of "firm and realistic"

delivery dates. The defendant finally replied to this letter over a month later on September 27, 1950, in which reply he stated that he had been trying to obtain a firm delivery schedule from his subcontractor. However, he neglected to furnish any of the information requested by the plaintiff. At this time, it should be noted, the subcontractor had not yet even confirmed the defendant's order of August 12, 1949.

On October 23, 1950, over three weeks after the last extension had expired without delivery or satisfactory answer to the plaintiff's request for a progress report, the Bureau of Ships Contracting Officer, L. T. Harrison, notified the defendant by letter that he was in default on the contract, requesting a cure of this default within ten days or, in lieu thereof, a statement of the reasons, if any, as to why the contract should not be terminated for default. This default notice, or "ten-day cure letter" as it is called by the government witnesses, was sent to the defendant pursuant to Section 11 of the principal contract, the pertinent part of which reads as follows:

"Section 11. Default

"(a) Whenever the Contractor

"(1) refused or fails to make deliveries of the articles called for herein within the time specified in this contract, or

"(2) otherwise defaults in the performance of this contract or so fails to make progress in the prosecution of the work hereunder as to endanger performance of this contract in accordance with its terms and fails to cure such default or failure within a period of ten days (or such longer period as the contracting officer may allow) after receipt from the contracting officer of a notice specifying the default or failure, the Government, subject to the provisions of paragraph (a) of the Section hereof entitled 'Ter-

mination at the Option of the Government' and of paragraph (f) below, may by a notice in writing to the Contractor terminate the performance of work under this contract in whole or in any part."

Although there are vague allusions in the testimony to other letters written to the plaintiff by the defendant shortly following the default notice, there is no evidence as to when they were transmitted or what they contained. However, on November 15, 1950, having the previous day received confirmation of his order from the subcontractor, Industrial, the defendant wrote the plaintiff, advising of the confirmation. In this letter the defendant represented that the two shafts in issue should be ready for shipment by May 1, 1951. Five days later, on November 20, 1950, Industrial advised the defendant that it was having technical difficulties with its own contract with the Navy to produce some submarine shafts for the Portsmouth Navy Yard, and that these submarine shafts would have to be completed before Industrial would proceed with the work for the defendant. The defendant did not immediately inform the plaintiff of this new development.

The plaintiff's contracting officer, in ignorance of Industrial's problems and of the inevitable resultant delay in the completion of the defendant's contract, wrote the defendant on November 30, 1950, advising him that in view of the representations contained in the defendant's letter of November 15, 1950, as to expected delivery dates, no further action would be taken regarding the determination of default. This letter closes with the following sentence: "The Government reserves the right, however, to terminate contract NObs-47684, without additional preliminary notice of default in performance, in the event of future failure to make progress under the contract." The defendant urges that the final phrase of this closing sentence has the effect of granting an indefinite extension, to continue so long as the defendant continues to make any progress at all under the contract. However, the let-

ter must be read as a whole in construing and determining its intent. It is the opinion of the Court that the clear import of the letter is that the Government reserved the right to terminate the contract for default without an additional default notice, but that in view of the defendant's representations as to expected delivery dates it promised not to cancel the contract at that time, presumably in order to give the defendant a chance to meet the delivery date of May 1, 1951. Although the phrase in question is admittedly rather poorly worded, it is the Court's finding that under a reasonable construction this phrase refers to progress toward completion on the stipulated date of May 1, 1951.

On December 15, 1950, when the defendant visited Industrial's plant in Canton to make an investigation of the problems there, Industrial requested the defendant's personal assistance in working out certain technical difficulties which had developed in connection with performance of its own prime contract with the Navy. Then on the same or following day, the defendant notified the plaintiff of the difficulties at Industrial; and during December he had several personal interviews with Commander Rupp (Captain Rupp at the time of trial), the Bureau of Ships' technical representative, concerning the technical problems involved in Industrial's contract with the Navy.

The defendant, Thompson, strongly contends that he was led by the Navy's representatives to believe that Industrial's contract with the Navy was more important and pressing than his own and that if he would only assist in solving the problems of Industrial in connection with the submarine shafts, then the Navy would be content to let the defendant's own contract lie idle for the time being. However, the existence of such an understanding is not borne out by the evidence, but rather the overwhelming preponderance of the evidence shows that there was no such waiver of completion time, nor was the defendant justified in assuming that there was such a waiver.

From the testimony of the plaintiff's chief witness, Captain Rupp, who was at the time in charge of the branch of the Bureau of Ships which had direct cognizance of the contract in question, it appears that the Navy considered and treated the contract with the defendant and the contract between the plaintiff and Industrial as completely separate contracts, not as being interrelated. The progressing of Industrial's contract was handled directly with Industrial, not through the defendant. Witness Rupp testified that in his recollection there was no connection at all between the contract with the defendant and the one with Industrial, and that he told the defendant that anything he did for Industrial would have no bearing on his own contract with the Bureau of Ships.

Mr. Marley, one of the Navy's contracting officers, testified that he did not recall the defendant ever having mentioned the situation at Industrial or the fact that he was working on Industrial's problems. He testified that on many occasions the defendant would drop in at his office, in a big hurry, tell him that he had talked to certain officials, that everything was all right, that he (Marley) did not have anything to worry about any more, and that the shafts were going to be delivered, and then leave the office.

Mr. Weatherly, another Navy contracting officer, testified that all of the conversations which he had with the defendant were concerning the subject of the default situation in connection with the defendant's own contract.

Mr. Fisher, a production specialist in the office of the Inspector of Naval Material in Pittsburgh, testified that he attempted several times to progress and expedite the contract, constituting a continual notice to the defendant that the Navy was at all times interested in obtaining performance of the contract. On February 3, 1951, subsequent to the time that the defendant maintains his contract was indefinitely suspended, witness Fisher inquired

of the defendant by letter about the progress of his own contract. The defendant replied to this demand for a progress report on February 5, 1951. In this reply the defendant stated that his contract was not progressing at all because of his personal supervision of Industrial's contract and Industrial's inability to work on both contracts at the same time. He further stated in this letter that the officials in Washington knew all about the situation and that he had asked Marley not to charge the delay against his performance record. The defendant also stated in this letter that it would possibly be about two more weeks until work would be commenced by Industrial on the subcontract, and that he would promptly advise. The statements in this letter to the effect that the officials in Washington knew the full story are, as indicated above, simply not borne out by the preponderance of the evidence and the Court does not find any persuasive evidence to show that the defendant was justified in so assuming.

Nevertheless, the defendant continued during the year 1951, to work on the manufacturing problems in connection with Industrial's contract with the Government, making no direct progress under his own contract. The evidence shows that he was compensated, whether adequately or not does not appear, by Industrial Forge and Steel Company for his efforts in this connection.

It does not appear that the defendant made any serious or determined effort to order the required work from another subcontractor. However, even if he had and failed, it was not the Government's fault that he was unable to find a substitute. Nor can it be said that it was the fault of the Government that Industrial Forge and Steel was thus overburdened with government contracts to manufacture shafts for the Navy. The defendant's own contract indicated that the sole place of manufacture was to be the defendant's shop in Parkersburg.

On January 14, 1952, the plaintiff terminated the contract for default under the terms of the contract, notify-

ing the defendant that it would readvertise for replacement bids and would hold the defendant accountable for the excess costs of obtaining the shafts from other suppliers. It is the opinion of the Court, after considering all the evidence, that the defendant was in default, had been given notice thereof, and that the plaintiff was within its rights in terminating the contract and holding the defendant liable for the excess costs.

The defendant contends that this termination for default was in violation of the terms of Section 11(f) of the contract in that he was not in default within the meaning of this section. The pertinent parts of Section 11(f) provided as follows:

> "(f) This contract shall not be terminated under the provisions of this Section and the Contractor shall not be charged with any liability to the Government if the default or failure of the Contractor is due to causes beyond the control and without the fault or negligence of the Contractor. Such causes shall include but not be restricted to * * * (2) acts of the Government of the United States or any State or political subdivision thereof, * * * or (10) delays of a subcontractor or supplier in furnishing material or supplies owing to causes beyond the control and without the fault or negligence of the Contractor unless the Contractor could reasonably have procured the materials or supplies from other sources."

Although this contention raises questions of mixed law and fact, the main questions are ones of fact, so the Court will consider and dispose of this contention here. Upon consideration of the evidence and the facts hereinbefore stated, the Court is of the opinion that the preponderance of the evidence shows that the default of the defendant was not due to causes beyond his control and without his fault or negligence. To answer the contention more particularly, the default was not, as envisaged by subsection (2) above, caused by any acts of

the Government or its agents. This finding and the reasons for it have already been set out above. The default was probably due to "delays of a subcontractor", as stated in subsection (10) above, but the delays were not owing to causes completely without the fault or negligence of the defendant. As shown, much of the delay was attributable solely to the procrastination of the defendant himself. Furthermore, there is no evidence to the effect that the defendant could not reasonably have procured the work and materials from "other sources". On the other hand, there is evidence to the effect that there were several other concerns which were equipped and able to do such work but the defendant made no serious effort to obtain the work from another subcontractor. The Court therefore finds that the defendant could reasonably have obtained the work and materials from other sources. It follows, therefore, that the defendant's contention that the facts bring this case within the exception of Section 11(f) is without merit.

Thereafter, although the contract had been legally terminated, negotiations were had between the defendant and representatives of the plaintiff at which the defendant was told that the termination notice would not be rescinded, but that the shafts would be accepted by the plaintiff if they were completed and passed inspection prior to the awarding of replacement contracts. This offer by the Government was purely gratuitous and was made with the understanding that the business risk involved in attempting to take advantage of it would lie solely with the defendant.

The defendant again bid on this work following the Navy's action in seeking new bids to replace defendant's contract. On March 26, 1952, the defendant's bid, although the lowest, was disqualified as not being responsible. In view of the past performance of the defendant with regard to the contract in issue, the Court is of the view that such disqualification was clearly warranted.

At the instance of the defendant, further negotiations were conducted on April 19, 1952, after which the plaintiff offered to reinstate the contract if the defendant would furnish a 100% performance bond. However, the defendant failed to furnish such bond.

On June 9, 1952, with the purpose of persuading, or even forcing, the Navy to accept the defendant's bid on the replacement contracts, the Small Defense Plants Administration issued a certification of the defendant's competency, *as to capacity and credit*, to perform the contract, if it were reinstated with a delivery date of one hundred to one hundred and twenty working days from the date of reinstatement. The Navy refused to be thus persuaded.

On June 17, 1952, the plaintiff awarded replacement contracts at an excess net cost of $16,007.31 for the two shafts which are the subject of Count I. The Government was indebted to the defendant on another matter in the amount of $1,681.86, which amount was credited by the plaintiff against the excess costs, leaving a net amount of $14,325.45 claimed by the plaintiff under Count I. Counts II and III.

On November 14, 1950, the United States Army Corps of Engineers, New Orleans District, awarded a contract, the subject of Count II of the complaint, to the defendant for the production of certain spare parts for dredges for the price of $3,800, delivery to be made within 120 calendar days.

On February 28, 1951, the same service agency awarded another contract, the subject of Count III, for additional spare parts to the defendant, at a price of $8,339.50, delivery to be made within 90 calendar days.

Neither of these contracts was completed within the time specified, and by letter dated August 28, 1951, the contracting officer of the plaintiff, acting in accordance with the standard termination clauses contained in both

contracts, notified the defendant that the subject contracts were thereby terminated for default. The defendant attempted to persuade the plaintiff's contracting officer to reinstate the contracts, but to no avail.

Subsequently, the Corps of Engineers awarded replacement contracts for the spare parts required under the defendant's defaulted contracts at excess net costs of $562 and $462.58, respectively. Count IV.

On April 6, 1950, the United States Army Corps of Engineers, New York District, awarded a contract to the defendant for one dredge propeller tailshaft, at a price of $10,625, to be delivered within 120 to 150 calendar days.

Again the defendant failed to make delivery under this contract and, by letter of May 9, 1951, the contracting officer terminated the contract for default in accordance with the terms of the contract. Defendant offered to obtain a performance bond and was told that if he did obtain such a bond, reinstatement would be considered. However, the bond was never furnished and the contract was not reinstated.

Subsequently, on July 23, 1951, the Corps of Engineers awarded a replacement contract for the propeller tailshaft required under the defendant's defaulted contract at an excess net cost of $2,078.13.

The specifications of the defendant's terminated contract for the tailshaft required the tailshaft's outer sleeve to be nickel-copper alloy which, at the time of the original contract, was readily available on the market. However, due to the increased demands after the start of the Korean conflict, the desired alloy was quite difficult to obtain at the time of the awarding of the replacement contract. The Government, therefore, relaxed the specifications, substituting bronze for the nickel-copper alloy. On the basis that the alloy was preferable to bronze, that the alloy was "exceedingly difficult, if not impossible" to obtain at the time of the replacement contract although "available on the market" at the time of the original

contract, and that the market price of the required amount of the alloy at the time of the replacement contract was $1,000 more than the market price of the required amount of bronze, the plaintiff says that it was further damaged to that extent and seeks to hold the defendant accountable for an additional one thousand dollars.

Discussion of Applicable Law

In the determination of this case, the laws of the State of West Virginia control. In re Estate of Fox, 1948, 131 W.Va. 429, 48 S.E.2d 1, 7 A.L.R.2d 1. Each of these contracts in question provides that in case of default by the contractor and termination of the contract for the default, the contractor shall be liable to the Government for the cost of procuring the articles required from other sources in excess of the price fixed under the original contract. Therefore, the damages in this case on each contract will be the excess net cost to the plaintiff of procuring the items by way of replacement contracts. See Huminsky v. Gary National Bank, 1929, 107 W.Va. 658, 150 S.E. 9; 25 C.J.S., Damages, § 74 (1941).

The defendant's theories of defense (2) and (3) to Count I, as enumerated supra, are both premised on the doctrine of promissory estoppel, as explained by Professor Williston in 3 Williston, Contracts, § 679 (1936). Therein it is said that one type of waiver is:

> "3. A promise or permission express or implied in fact, supported only by action in reliance thereon, to excuse performance in the future of a condition or to give up a defense not yet arisen, which would otherwise prevent recovery on an obligation. If waiver can be given any legal meaning narrower than the surrender of any right or defense by any means, this kind of surrender may properly be given the name. The promise is binding and the permission effective though without consideration. There is often said to be an estoppel here and the case is said to be distinguishable from waiver, but there is

not a true estoppel, for there is no misrepresentation of an existing fact. It may be called a promissory estoppel."

The Restatement of Contracts, § 297, also recognizes the general existence of such a doctrine although it does not mention the words "promissory estoppel".

The defendant urges the applicability of the following statement in 2 Williston, Contracts, § 689 (1936):

> "There has been a distinct tendency in courts of equity to enforce promises where something resembling a fraud would otherwise be perpetrated. Nothing could well have a more fraudulent operation than to allow one who is bound by a conditional promise to indicate by words or acts, while performance of the condition is still possible, that its non-performance will not affect his own action under the contract, and, subsequently, when in reliance on this statement, the promisee has failed to perform the condition, and the time has passed when it is possible to do so, to set up the failure as an excuse for the non-performance. It is immaterial whether the condition is express or imposed by law. Thus, where before expiration of the time originally fixed for performance the time is extended, though without consideration, performance within the extended time is sufficient; * * *."

Although the above quotation is considered to be a good statement of the law as far as it goes, it does not go far enough. Williston, in the same volume and section, goes further:

> "To bring the case within the reason of the rule it is essential that the promisee could and would have performed the condition, or would not have allowed the defense to arise, had it not been for the promisor's waiver. For if the promisee could not have entitled himself to performance of the promise,

> even had there been no waiver, there is no equitable reason why the promisor should not take advantage of the breach of condition or other defense. He has promised that he would not, but his promise was not only wholly gratuitous, but has not been acted on."

It is not shown, nor is it reasonable to believe from the evidence, that the defendant could or would have performed the condition if the plaintiff had not promised to defer requiring performance, even assuming that the plaintiff did so promise. The defendant bid on the contract in the first place, having no intention of performing it according to its original terms, and knowing full well that he would have to rely upon a subcontractor, then unknown, to do most of the work for him. He continually requested and received extensions of time, all the while having no assurance himself that he would ever be able to perform, since he did not receive confirmation of his order from Industrial until more than twenty months after the contract date. He did not even place the order with Industrial until more than five months after the contract date, while under the original contract the completed shafts were due within six months. It is manifest from the evidence that the subcontractor, Industrial, could not, or as least would not, perform the defendant's work before its own Navy contract was completed; and considering the propensities evidenced by the defendant and the history of this contract, there is no justifiable reason to assume that the defendant would have engaged another subcontractor to take the place of Industrial and thus perform his part of the contract on time.

However, the Court need not rest its decision on this reasoning because, as indicated above, the Court has found as a fact that there was no express or implied promise by the plaintiff to suspend or waive the delivery time. The burden of proof to establish a waiver is on the party asserting or claiming the benefit of the waiver,

and it is never presumed. Hoffman v. Wheeling Savings & Loan Association, 1950, 133 W. Va. 694, 57 S.E.2d 725. In the opinion of the Court, the defendant has not sustained this burden.

With respect to Count I, the defendant contends also that his bid on the replacement contracts was wrongfully and illegally rejected, since his bid was the lowest and since it received the Small Defense Plants Administration certification. As to this certification, the Court concurs with the decision of the Comptroller General of the United States, handed down in the case on November 17, 1952, to the effect that such certification, under the circumstances, should not be binding on the Navy. Although this certification might vouch for the defendan't competency as to capacity and credit, it did not insure or guarantee performance. The existence of ability to do a job does not necessarily import the existence of the tenacity or perserverence necessary to do the job for which one has the ability. The facts comprising the history of this contract show the failure of the defendant to perform the contract, whether through disinclination or lack of ability and perseverance. In view of this, the Court can find no fault with the Navy's refusal to accept a paper certification of the defendant's competency in the particulars mentioned. Although it is quite true that the Navy must accept such certification as conclusive, the certification goes only to the plant's competency as to capacity and credit. It does not presume to certify that the plant *will* perform, only that it *can*. Moreover, the language of the pertinent section, 714(f)(1), of the Defense Production Act of 1950, 64 Stat. 798, as amended by Public Law 96, 65 Stat. 131 (1951), 50 U.S.C.A. Appendix, § 2163a(f)(1), does not purport to require the government agency to give the certified plant the contract. Rather, it uses the word "authorized", as is shown in the following reproduction of that section:

> "(f)(1) In any case in which a small-business concern or group of such concerns has been certified

by or under the authority of the Administration to be a competent Government contractor *with respect to capacity and credit* as to a specific Government procurement contract, the officers of the Government having procurement powers are directed to accept such certification as conclusive, and *are authorized* to let such Government procurement contract to such concern or group of concerns without requiring it to meet any other requirement *with respect to capacity and credit.*" (Emphasis supplied.)

It is, therefore, the conclusion of the Court that the S.D.P.A. certification of June 9, 1952, had no legal effect on the issue here involved.

As to the $1,000 element of special damage claimed by the plaintiff to be due under the contract of Count IV because of the difference in metal used under the replacement contract, the Court finds as a matter of law that the evidence is not sufficient to sustain such claim. In proving damages the loss must be shown, with reasonable certainty, to have been caused by the defendant's breach of duty, and the trier of fact may not base findings of damages on conjecture or speculation. Turk v. McKinney, 1949, 132 W.Va. 460, 52 S.E.2d 388. See Oates v. Continental Ins. Co., 1952, 137 W.Va. 501, 72 S.E.2d 886. It is not shown that the substitution of bronze for nickel-copper alloy was actually a detriment to the plaintiff. The one witness who testified in connection with this contract stated that, strictly in his own opinion, he did not think the bronze was equal in wearing quality to the nickel-copper alloy, and that the service agency involved felt that it could not estimate the probable damage. Any determination by the Court of any damage, and the amount thereof, in this connection would be purely conjectural and speculative. In addition, it was not shown by the testimony that the relaxation of specifications was necessary in the replacement contract. The only evidence on this point is to the effect that, although

the alloy was difficult to obtain at the time of the replacement contract, it was obtainable.

As to the defendant's counterclaim (a) for the amount of $1,681.86, which the plaintiff admittedly owes the defendant as a result of previous dealings, the plaintiff had the right, under 18 Stat. 481 (1875), as amended, 31 U.S.C.A. § 227 (1954), to withhold payment of this amount until the claims of the plaintiff were pressed to final judgment. See Hines v. United States ex rel. March, 1939, 70 App.D.C. 206, 105 F.2d 85; Richmond, F. & P. R. Co. v. McCarl, 1932, 61 App.D.C. 290, 62 F.2d 203. However, as the indebtedness to the defendant is admitted by the plaintiff, judgment for the amount due the defendant must be given on the counterclaim. See Thompson v. United States, 4 Cir., 1957, 250 F.2d 43, 44 (dictum).

In view of the Court's conclusion that the plaintiff was justified in terminating the Navy contract, it naturally follows that the defendant may recover nothing on his counterclaim (b), praying for damages equal to his loss of profits on the ground that the termination was wrongful.

Because of the intimate interrelationship of the facts and the legal conclusions, the Court has refrained from attempting to separate the two. Therefore, the foregoing shall be considered as containing the Court's findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A.

In view of the above findings of fact and conclusions of law, the Court finds the defendant liable to the plaintiff for the total of the net excess costs incurred by the plaintiff under the four replacement contracts over and above the contract price of the respective original contracts, with interest thereon; disallowing, however, the additional $1,000 claimed by the plaintiff under Count IV.

The amount to be recovered by the plaintiff shall be computed as follows:

1. As to Count I, the principal amount of $16,007.31, plus interest thereon at 6% per annum from January 14, 1952, to the date of the judgment.

2. As to Count II, the principal amount of $562, plus interest thereon at 6% per annum from August 28, 1951, to the date of the judgment.

3. As to Count III, the principal amount of $462.58, plus interest thereon at 6% per annum from August 28, 1951, to the date of the judgment.

4. As to Count IV, the principal amount of $2,078.13, plus interest thereon at 6% per annum from May 9, 1951, to the date of the judgment.

Judgment is hereby rendered for the sum of the above four aggregate amounts, with interest thereon at 6% per annum from the date of the judgment until such judgment shall be satisfied. The allowances of interest herein are in accordance with W.Va. Code, c. 56, art. 6, §§ 27 and 29 (Michie 1955).

In addition, the Court finds the plaintiff liable to the defendant under defendant's counterclaim (a) in the amount of $1,681.86 and judgment is hereby accordingly rendered for that amount in favor of the defendant, with interest thereon at 6% per annum from the date of judgment until the same shall be satisfied.

Although judgments on the principal claim and the counterclaim are rendered separately, the Court is of the opinion that the plaintiff may offset the amount of the judgment on the counterclaim against the amount of the judgment in favor of the plaintiff if so advised.

Counsel for the plaintiff shall prepare an appropriate order consistent herewith providing for the entry of judgments as of December 12, 1958, the date hereof.

APPENDIX H

DECISION OF THE COMPTROLLER GENERAL

[B-180380]

In the matter of

Plattsburgh Laundry and Dry Cleaning Corporation; Nu Art Cleaners Laundry, July 15, 1974:

Invitation for bids (IFB) No. DAKF36-74-B-0028 was issued December 18, 1973, by Camp Drum, Watertown, New York, for laundering services on a 100 percent small business set-aside basis. The protest arises by reason of section "D" of the IFB, "Evaluation and Award Factors," which provides that "Only those facilities located within a radius of ninety (90) miles of Camp Drum, New York, will be considered for award." Two bids were opened at 2 p.m. on January 7, 1974. The $87,763.40 bid of Nu Art Cleaners Laundry, Felts Mills, New York, was low followed by the $91,524.90 bid of R. Gibson, Inc., of Watertown, New York.

In its telefax message dated January 5, 1974, and letters dated January 21 and March 14, Plattsburgh Laundry and Dry Cleaning Corp. (Plattsburgh) protested to our Office against the 90-mile geographic restriction and the fact that it was not given an opportunity to bid. Plattsburgh, which we understand is located about 165 miles from Camp Drum, was the predecessor contractor for these services. In its letter of March 14, 1974, the protester states that on December 17 and 18, 1973, it telephoned the contracting officer to inquire when the solicitation for the successor contract would be distributed, and it was told that it would receive a copy of the IFB during the week of December 18. However, Plattsburgh states that on December 28, 1973, it was told by a procurement official that the solicitation had been mailed only to those prospective bidders within a 90-mile radius of Camp Drum. Platts-

burgh states that it protested orally to Camp Drum officials on January 2 and 4, 1974 against the restrictiveness of the geographic limitation and what it terms the denial of its right to receive a copy of the bid package. Finding that it was unable to resolve the matter with the procuring agency officials, Plattsburgh then filed a written protest with our Office.

By letter of March 1, 1974, with enclosures, the Assistant Deputy for Materiel Acquisition, Office of the Assistant Secretary, submitted the Department of the Army report on the protest. It is the agency's position that the protest is untimely, since GAO's Bid Protest Procedures and Standards require that protests against alleged improprieties in solicitations which are apparent prior to bid opening be filed prior to bid opening. 4 CFR 20.2(a). In addition, the agency has pointed out that our Office has held that the need of a contracting agency for prompt service and plant accessibiilty may afford a reasonable basis for including in an invitation for bids a provision requiring bidders to have facilities located within a specified geographic area for performance of a contract. In this regard, the agency cites B-150703, February 15, 1963, where we upheld a 50-mile restriction in a solicitation for laundry services in Washington, D.C.

In addition, the contracting officer has offered the following explanation of why the 90-mile geographic restriction was adopted:

> The requesting activity requested that the area of performance be limited to a ninety (90) mile radius of Camp Drum in order to insure expeditious pickup and delivery of the services required.
>
> Historically, contractors located beyond a ninety mile radius have performed marginally and/or subcontracted the services to facilities located within the ninety mile radius.

> Camp Drum is serviced by unimproved two lane highways to the southeast and interstate highways to the south. Camp Drum and surrounding area is subjected to severe inclement weather during the period October through March.
>
> During the period April through September, approximately 70,000 troops conduct annual training at Camp Drum, and timely pickup and delivery of laundry services is required in order for the installation to perform its mission in support thereof as this installation does not have sufficient stockage for issue when services are not received as scheduled under the contract.
>
> * * * *
>
> * * * the inclusion of an area limitation of ninety (90) miles * * * will insure timely receipt of services required to support Annual Training which will reduce administration costs and will be in the best interest of the Government.

Initially, the record indicates that Plattsburgh's protest to our Office was timely filed. A protest is "filed" with our Office at the time of receipt. 4 CFR 20.2(a). In the present case, the notice of protest was sent by a telefax message dated January 5, 1974, and received at our Office at 8:20 a.m. on January 7, 1974. Since bid opening did not take place until 2 p.m. the same day, the protest against the alleged impropriety in the solicitation was timely. In addition, to the extent Plattsburgh's protest was directed at its exclusion from the competition and denial of an opportunity to submit a bid, the protest filed on January 7, 1974, was timely since it was filed with five working days of "adverse agency action"—that is, the rejection by Camp Drum officials of Plattsburgh's oral protests on January 2 and 4, 1974. *See* section 20.2(a), GAO Bid Protest Procedures and Standards.

Our Office has recognized that a geographic restriction may constitute a legitimate restriction on competition where the contracting agency has properly determined, after careful consideration of the relevant factors involved, that a particular restriction is required. We have stated that determination of the proper scope of a restriction is a matter of judgment and discretion, involving consideration of the services being procured, past experience, market conditions, and other factors. *See* 53 Comp. Gen. 522 (1974), and decisions cited therein.

A reasonable expectation that potential contractors located beyond a certain distance will not satisfactorily perform can provide a basis for the establishment of a geographic restriction. B-150703, *supra*. In the present case, the contracting officer has cited highway conditions, severe winter weather, and historical experience of marginal performance by contractors located beyond 90 miles as reasons why the 90-mile restriction was included in the solicitation. In its March 14, 1974, letter, Plattsburgh contests the contracting officer's implication that highways in the area are inadequate, contending that it has not experienced difficulties in this regard. As for the severe winter weather, the protester points out that the bulk of the work occurs during the summer months. However, the protester has not shown the contracting officer's finding that past performance by contractors beyond 90 miles was marginal is without reasonable basis. We therefore conclude that the 90-mile restriction is not objectionable. *Cf.* 53 Comp. Gen. 102, 103-104 (1973).

A more serious issue is raised by Plattsburgh's contention that it was denied a copy of the IFB and thus an opportunity to bid. The inadvertent failure to furnish a prospective bidder with a copy of a solicitation does not ordinarily require a resolicitation of bids where

adequate competition and reasonable prices were obtained in the bidding. *See* 49 Comp. Gen. 707 (1970). However, where the omission appears to be conscious and deliberate rather than inadvertent, a different question is presented. In B-173029, September 1, 1971, we held that a deliberate failure to furnish a copy of the solicitation to an incumbent contractor on the basis that it lacked the capacity to perform was an improper and premature nonresponsibility determination. Where the incumbent is a small business concern—as here—we have held that such failure to solicit tends to undermine the purposes of 15 U.S. Code 637(b)(7), whereunder the Administrator of the Small Business Administration is empowered to conclusively certify to the capacity and credit of a small business concern to perform a particular Government contract. 45 Comp. Gen. 642 (1966).

We do not believe that the apparent refusal to provide the protester with an opportunity to bid could be supported on the basis of doubts as to Plattsburgh's capacity to perform. Moreover, the establishment at the 90-mile geographic restriction could not support such action. A geographic limitation requiring bidders' facilities to be located within a certain area relates to bidder responsibility, not to bid responsiveness, and a bidder may thus be properly allowed to demonstrate compliance with the requirement after bid opening and before award. 50 Comp. Gen. 769, 772 (1971); B-171586(2), April 29, 1971; B-170798, November 13, 1970.

In addition to the failure to provide a copy of the solicitation to the incumbent contractor, we have been informally advised by the Department of the Army of other circumstances indicating that competition was unduly restricted. We are informed that the IFB was not synopsized in the Commerce Business Daily as required

by Armed Services Procurement Regulation (ASPR) 1-1003.1(a), and that copies of the solicitation were pro-provided to only three potential sources of supply.

In view of the foregoing, we are recommending to the Secretary of the Army by letter of today that IFB DAKF36-74-B-0028 be canceled and that the protester, and other firms similarly situated, be provided with an opportunity to bid in response to a resolicitation for the laundry services.

APPENDIX I

DECISIONS OF THE COMPTROLLER GENERAL

[B-158005, B-158488]

To the Secretary of the Navy, April 19, 1966:

Reference is made to letters dated December 21, 1965, and March 4, 1966, signed by the Assistant Chief for Purchasing, Bureau of Supplies and Accounts (SANDA 642), forwarding reports on the protest of Linochine Products Corporation against the omission of the Aviation Supply Office, Philadelphia, Pennsylvania, to solicit the company for an offer in connection with Request for Quotation 383/603139/66 issued on October 1, 1965. We also refer to a letter dated March 16, 1966, from the same office, forwarding a report on Linochine's protest against the failure of ASO to request an offer from them pursuant to Request for Quotation 383/603290/66 issued on December 15, 1965. The solicitations, as amended, sought proposals to furnish 1231 (615 on a labor surplus set-aside basis and 616 unreserved) and 1246 units, respectively, of the Aero 7A-1 Bomb Ejector Rack. Both procurements were negotiated pursuant to the public exigency exception set forth at 10 U.S.C. 2304(a)(2) and neither was synopsized in the Commerce Business Daily because it was deemed that the Government could not afford the delay incident to the publication. Compare Armed Services Procurement Regulation 1-1003.1(c)(iv).

It appears from the record that only five companies have ever held contracts for delivery of this particular type of bomb rack: Douglas Aircraft Company; Singer Manufacturing Company; Courter Products Division, Model Engineering and Manufacturing Company; Standard Armament Corporation; and the protestant, Linochine Products Corporation. The first four companies received copies of both requests for quotation. After expiration of the revised closing date for receipt of proposals on the first mentioned solicitation, viz October 22, 1965, Linochine representatives first became

aware of the existence of that procurement. A copy of the RFQ was requested from ASO but was refused on the ground that the closing date for receipt of proposals had passed. Subsequently the first solicitation resulted in two awards to Courter; the first, dated November 23, in the amount of $920,920, and the second dated November 26 in the amount of $919,425, covering the labor surplus set-aside portion. The second solicitation resulted in an award on January 4, 1966, to Standard Armament Corporation.

Linochine Products Corporation is an incumbent contractor on the item having been awarded its first contract for production of the Aero 7A-1 Bomb Ejector Rack, contract No. N600(19)62604, by the United States Navy Purchasing Office, Washington, D.C., on July 30, 1964. That contract, at a unit price of $1,259, covered 286 units to be delivered as follows: two preproduction prototypes 150 days after the contract date and 30 units per month beginning 300 days after award. The aforementioned reports from the contracting officer state that Linochine was not solicited because as of October 1, 1965, when the first request for quotations was issued, Linochine had yet to qualify its first preproduction sameple and was in default on its deliveries of production units, a situation which was compromising the ability of your department to satisfy the user. The requirements covered by the negotiated solicitations were urgently needed for installation in new aircraft and for the retrofit of certain other aircraft starting in January 1966 until the scheduled completion date of the programs in November 1967.

The protest is based upon the contention that both procurements were conducted without meaningful competition in contravention of the express statutory mandate enacted by the 1962 amendments to the Armed Services Procurement Act and set forth at 10 U.S.C. 2304(g), because Linochine, an allegedly responsible sup-

plier of the items being purchased, was not solicited for an offer.

In the opinion of our Office contracting officers are without authority to utilize the procedure of deliberately neglecting to solicit an incumbent contractor, who is known to be a small business, for an offer on a negotiated procurement as a means of enforcing a determination of nonresponsibility. The countenancing of such a procedure would tend to undermine the purposes behind section 8(b)(7) of the act of July 18, 1958, 72 Stat. 389, 15 U.S.C. 637(b)(7), empowering the Administrator of the Small Business Administration to certify in a manner conclusive upon officers of the Government having procurement powers as to the capacity and credit of a small business concern to perform a specific Government contract. No findings have been made that the defects in Linochine's performance under contract No. N600(19) 62604 were due to factors other than "capacity" set forth at ASPR 1-705.4. The proper method for the contracting officer to have vindicated any doubts about Linochine's qualifications as a prospective contractor would have been to solicit the company for proposals in the first instance and then to promulgate a determination of nonresponsibility, if such action were still deemed appropriate, during the evaluation period. If award could not be held up pending a referral to SBA the contracting officer's remedy would have been to execute the certificate described in ASPR 1-705.4(c)(iv). We cannot condone the practices followed on the two solicitations in point which in this case denied the company resort to statutory procedures created by Congress for the benefit of just such a small business entity as Linochine, and which gave the appearance of a boycott of the company's products.

Protestant has also alleged that the three contracts under discussion were awarded at exorbitant unit prices; a fact which they say is supported by the recent pricing

history of Aero 7a-1 Bomb Ejector Rack procurements. The following chart illustrates the upward trend in the unit price paid for the rack despite the increase in the number of units per contract and the expected moderating influence of the manufacturer's learning curve.

Date	Winning Bidders	No. Units	Unit Price
12/63	Standard Armament	534	$1,364
	Courter Products	534	1,364
4/64	Linochine Products	284	1,259
11/65	Courter Products	1,231	1,495
1/66	Standard Armament	1,246	1,595

In his explanation of this the contracting officer makes no mention of the effect upon the price of the emergency delivery schedule so it can only be assumed that it is not significant. He has advised our Office that both Courter and Standard Armament have let it be known that they experienced losses performing contracts let at a unit price of $1,364 and concluded that the most recent awards were at fair and reasonable prices.

It is noteworthy that the contracting officer did not require either Courter or Standard Armament to submit in writing cost or pricing data and to certify that such data was accurate, complete, and current, prior to making award under the two protested solicitations. Compare ASPR 3-807.3(a)(ii). The reason for this is that adequate price competition was determined to exist in connection with the procurements. Compare ASPR 3-807.3(c). The contracting officer relies on ASPR 3-807.1(b)(1)a which states in pertinent part:

> a. Price competition exists if offers are solicited and (i) at least two responsible offerors (ii) who can satisfy the purchaser's * * * requirements (iii) independently contend for a contract to be awarded to the responsive and responsible offeror submitting the lowest evaluated price (iv) by submitting priced offers responsive to the expressed requirements of

the solicitation. Whether there is price competition for a given procurement is a matter of judgment to be based on evaluation of whether each of the foregoing conditions (i) through (iv) is satisfied.

We are inclined to think that the contracting officer would have been justified in using his discretion to require cost and pricing data and to ignore the literal wording of the definition of adequate price competition in this instance. In our view such would have been the preferable procedure. As has been pointed, past requirements of the Aero TA-1 Bomb Racks had been satisfied through the medium of formal advertising and the known pricing history of the item might reasonably have been construed as casting doubt upon the reasonableness of Courter and Standard Armament quotations.

Since both Courter Products and Standard Armament are in production of the racks and there has not been pointed out to us any valid reason why the awards did not result in binding and subsisting contracts we are constrained to advise attorneys for protestant of our inability to redress the company's grievances in the matter. Nevertheless, especially since the first production lot delivered under contract No. N600(19)62604 appears to have been accepted and paid for on March 12, 1966, we must advise you that our Office would be compelled to object to any further failure on the part of agencies of your Department to solicit Linochine in connection with the procurement of further requirements of the Aero 7A-1 Bomb Ejector Rack.

The documents requested are returned herewith.

APPENDIX J

Certificate of Competency (COC)*

Office of Associate Administration for Procurement Assistance, U.S. Small Business Administration Standard Operating Procedure

[9]

CHAPTER 1

INTRODUCTION

1. *SBA'S RESPONSIBILITY*

Certificates of Competency are authorized by section 8(b)(7) of the Small Business Act, as amended. Referral of a proposed rejection of a bid or proposal of a small business concern because of: (1) a lack of responsibility or (2) ineligibility due to the provision of section 35(a) of title 41, United States Code (the Walsh-Healey Public Contracts Act) is made to the Small Business Administration. The Act is implemented by the provision of regulations of other agencies. It is the responsibility of contracting officers to refer such proposed rejections to SBA.

2. *BASIC CONCEPT*

a. A Certificate of Competency is a written instrument issued by SBA. It is addressed to a Government contracting officer certifying that the small company named therein possesses the capability to perform a specific Government procurement or sale contract. A separate COC, as appropriate, is issued for each specific Government procurement or sale. The COC Program is, in effect, an

* Effective March 3, 1980.

appellate procedure. This right of appeal is available to a small business concern whose bid or proposal for a contract for a procurement or disposal of property by a Government agency is to be rejected for (1) lacking responsibility or (2) ineligibility due to the Walsh-Healey Act. If the contracting officer makes such a determination, he must notify SBA that he proposes to reject the bid or proposal. SBA does not act on the contracting officer's referral alone. There must be an application by the bidder.

b. One of the purposes of the COC procedure is to assist the applicant in becoming established, or reestablished, with Government procuring agencies. It is not intended that the procedure be abused by forcing acceptance of a bidder in the face of continuing delinquency on other Government work, nor where the applicant continues to permit private sector work to interfere with performance on Government work.

c. The burden for submitting data to establish such responsibility or eligibility within applicable time limits rests with the applicant. An application must be supported by sufficient documentary evidence to sustain action by SBA.

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d. SBA should assist the applicant in developing the required documentation. SBA should point out deficiencies in the data and require more detailed explanation and documentation for better presentation.

3. *DEFINITIONS*

a. *Certificate of Competency* (COC) means a written instrument issued by SBA to a Gov-

ernment contracting officer, certifying that a small concern (or group of such concerns) possesses the responsibility or eligibility (with respect to the Walsh-Healey Public Contracts Act) to perform all or part of a specific Government procurement (or sale) contract.

b. *Capacity* means the overall ability of a prospective small business contractor to meet the quality, quantity, and time requirements of a proposed contract, plus other commitments. Certification of capacity means that SBA finds that the prospective contractor has the necessary organization, experience, operational controls, materials, skills, equipment and facilities, or has the ability to obtain them on a timely basis, and is able and can be expected to comply with the required or proposed delivery or performance schedule.

c. *Credit* means the financial capability of a prospective small business contractor to perform a contract, plus other commitments. Certification of credit means that the prospective contractor has, or has access to, and can be expected to use, the cash or credit obtained through banks, financial institutions, SBA loans, suppliers, subcontractors, or other sources to meet all financial requirements, with consideration given to unforeseen contingencies.

d. *Tenacity and Perseverance* are those qualities of persistence and steadfast pursuit of an undertaking with the aim to do an acceptable job. Past unsatisfactory performance, due to failure to apply the necessary tenacity or perseverance to do an acceptable job and

which is not attributable to lack of capacity or credit renders a concern nonresponsible. Certification as to Tenacity and Perseverance means that the prospective contractor has demonstrated to SBA that it has and will use the necessary persistence and steadfast pursuit to do an acceptable job on the contract in question.

e. *Integrity* is the quality of moral soundness and honesty. Certification of Integrity means that SBA has found the prospective contractor to have the business ethics necessary to perform a specific contract.

* * * *

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6. *POLICY STATEMENTS*

a. The Agency, under the authority given in section 8(b)(7) of the Small Business Act, will issue or decline a Certificate of Competency (COC) irrespective of the type of procurement or the dollar value thereof.

b. The COC procedure will be made available to any eligible small firm wishing to appeal the decision of a Government contracting officer who rejected the firm's low bid or proposal for lack of responsibility on a specific procurement or sale. SBA may also certify as to eligibility under section 35(a) of the Walsh-Healey Act.

c. To be eligible an applicant must be:

(1) A "small business concern" using the size standard as of the date of the determination and the SIC code contained in the solicitation; or

(2) A "group of such concerns" in the form of a small business pool approved under the Small Business Act.

A manufacturing, construction, or service concern shall not be eligible for a COC unless it performs a significant portion of the contract, measured in dollar value, with its own facilities and personnel on its own payroll.

Tool kit assemblers are required to provide items manufactured by small business concerns amounting to more than 50 percent of the kit value.

A nonmanufacturer (regular dealer) will be eligible for a COC on an unrestricted procurement without regard to the size of the manufacturer of the required product. (See section 121.3-8, revision 13, amendment 22.) However, the product must be manufactured in the United States.

Purchasers of Government property shall not be eligible for a COC unless they are regular dealers in the item, or are purchasing property for their own use.

d. The time limit for processing a COC is generally 15 working days beginning with the first working day after receipt of an acceptable referral.

e. The Office of the Associate Administrator for Procurement Assistance (AA/PA) will work with the Government procuring offices, through the Government Liaison Staff, to insure that Government procurement regulations are consistent with SBA's operating procedures.

[15]

f. (1) In the interests of maintaining good relationships with procuring agencies, general discussions will be held with contracting officials prior to COC issuance during which time files may be examined, including the taking of notes and exchanging copies of pertinent data as requested, but case files are not to be released without approval from the General Counsel. These discussions should concern additional factors developed by SBA and the procuring agency.

(2) Under no circumstances should any SBA office reveal final decisions to anyone outside SBA prior to release of formal notifications.

(3) Even though a COC is about to be declined, the applicant is not to be so advised nor extended any opportunity to withdraw the application, and in no instance shall any office recommend withdrawal of an application. Withdrawal action, in writing, solely on the part of the applicant will be honored.

g. It is the policy of SBA that a COC shall not be issued to an applicant without the prior written approval of the Standards of Conduct Committee when its sole proprietor, partner, officer, director or stockholder with a ten percent or more interest, or a member of the household, is a member or employee of a Small Business Advisory Council or is a SCORE or ACE volunteer. (See part 105.602 of title 13 CFR entitled Standards of Conduct, and SOP 90 54 2, "SBA Advisory Councils".)

h. Capacity and credit reviews will be made whether the referral is for capacity, credit or both. However, if only one element is referred, only a limited review should be made of the satisfactory area. Good judgment should prevail as to the amount of data required for the nonproblem area. The applicant should not be required to produce unnecessary data in accordance with the President's goal of eliminating all but essential paperwork.

i. It is the policy of SBA to determine the responsibility of the referred concern, not its big business suppliers.

j. To be considered acceptable, a referral from the contracting officer must include a determination of nonresponsibility. This determination should identify the element(s) of responsibility that is (are) lacking and provide a justification for the determination. In addition, the referral must include the supporting documentation used in arriving at the determination. The contracting officer should be contacted immediately upon receipt of an unacceptable referral and given the opportunity to submit the necessary information and documentation (see paragraph 10).

Opposition

Supreme Court, U.S.
FILED
MAR 29 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1216

In the Supreme Court of the United States

OCTOBER TERM, 1981

SILLER BROTHERS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

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QUESTION PRESENTED

Whether the Forest Service violated 15 U.S.C. (Supp. IV) 637(b)(7)(A) by not referring to the Small Business Administration its decision to ban a small business from bidding on the resale of a timber contract because the company had failed to cut any timber under the prior, expired contract.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1216

SILLER BROTHERS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-15a) is reported at 655 F.2d 1039.

JURISDICTION

The judgment of the Court of Claims was entered on June 17, 1981. A petition for rehearing was denied on October 2, 1981 (Pet. App. 16a). The petition for a writ of certiorari was filed on December 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

1. In 1974, after competitive bidding, petitioner was awarded a contract for the cutting and sale of 3,390 MBF (thousand board feet) of standing timber

in Bighorn National Forest at the price of $100 per MBF (Pet. App. 2a). The contract required petitioner to build 8.96 miles of access roads, the cost of which was to be credited against the purchase price (*ibid.*). At the end of the contract's three-year term, petitioner had completed only 5.86 miles of road, at a cost to it of $92,869.80, and it had not cut any timber (*ibid.*). As a result, when the Forest Service announced a resale of the timber, it notified petitioner that it could not rebid on the sale, citing a Forest Service regulation that provides:

> Except as otherwise provided in this section, no bid will be considered in the resale of timber remaining from any uncompleted timber sale contract from any person, or from an affiliate of such person, who failed to complete the original contract: (i) Because of termination for purchaser's [breach] or (ii) through failure to cut designated timber on portions of the sale area by the termination date, unless acceptance of such bid is determined to be in the public interest.

36 C.F.R. 223.5(h)(1). The Forest Service also notified petitioner that the government would assess damages against it for the losses the government sustained because of the resale (Pet. App. 2a). One company submitted a bid on the resale, offering $80.42 per MBF, and this bid was accepted (*id.* at 3a).

2. After petitioner's administrative appeal was dismissed as untimely (see Defendant's Response to Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment (hereinafter cited as "U.S. Br.") at Exh. 2), it filed suit in the Court of Claims seeking reimbursement for its expenses in building the road and return of its $6,233 deposit on the original contract (Pet. App. 3a). The

government counterclaimed for $45,772.15, the net losses that it sustained because of the failure to perform the contract. This amount represented the lower sales price on the resale plus administrative expenses of the resale, less the road expense credit and the deposit (*id.* at 13a). Petitioner's chief claim was that the Forest Service acted improperly in barring it from bidding on the resale. If it had not been barred, petitioner argued, its bid would have been higher than the successful bidder's (or the successful bidder would have counterbid a higher amount), thus reducing or eliminating the government's loss on the resale. Furthermore, petitioner contended, if the government sustained no loss, petitioner would have the right to be repaid its road credit and its deposit.

In its motion for summary judgment, petitioner's only argument on the question whether it should have been permitted to bid on the resale was that the Forest Service had erred by applying an older version of the resale regulation (see 36 C.F.R. 221.8a (1976)) instead of the current version, 36 C.F.R. 223.5(h)(1). Petitioner also made several arguments charging that the government failed to mitigate its damages. In an opposition and cross-motion for summary judgment, the government responded that the Forest Service regulations on resale were properly applied. In addition, the government noted that petitioner's view of the regulations would force the Forest Service to resell to a company that had irresponsibly defaulted on the previous contract (U.S. Br. 16-17). In its opposition to the government's cross-motion, petitioner defended its interpretation of the Forest Service regulations. It also briefly argued that the Forest Service's action could not properly have been based in part on the determination that petitioner was not responsible, because, under

15 U.S.C. 637(b)(7),[1] all determinations relating to the responsibility of a small business must be made by the Small Business Administration (SBA) (Pet. Br. in Opp. to Summary Judgment at 8-9). The government dismissed this contention in a short footnote in its reply brief (at 2 n.1), arguing that the burden was on petitioner to initiate a referral to SBA, and the reply brief went on to respond to a number of other arguments made by petitioner. Petitioner filed a final reply in which, *inter alia*, it argued that the agency, not the contractor, is responsible for making referrals to the SBA (Mar. 12, 1981 Pet. Br. 3-4).

The Court of Claims ruled in favor of the government (Pet. App. 1a-5a). The court dismissed a number of arguments presented by petitioner, including its claims that the Forest Service relied on the wrong version of its rebidding regulation (*id.* at 3a-5a), that the Forest Service did not adequately mitigate its damages (*id.* at 9a-12a), and that the Forest Service's calculation of damages was in error (*id.* at 13a-15a). The court also addressed the SBA referral question. The court traced the history of the SBA's power to pass upon the responsibility of a small business seeking a contract with the United States for procurement or for sale of government property, and it concluded that, "[i]n the special circumstances of this case" (*id.* at 9a), 15 U.S.C. 637(b)(7)(A) did not give the SBA the final authority to decide whether to bar petitioner from rebidding. The purpose of the statute, the court explained, "was to end the discrimination against small business" based solely on the companies' smallness (Pet. App. 8a). It found that purpose inapplicable here (*id.* at 8a-9a):

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[1] All references to Section 637(b)(7) are to Supp. IV of the 1976 edition of the U.S. Code.

> The Forest Service regulation does not discriminate against small businesses but generally bars all defaulting contractors from bidding upon the reletting of the contract. The Forest Supervisor refused to allow the plaintiff to participate in rebidding, not because of alleged deficiencies stemming from its size, but because of its failure to cut any timber under the prior contract. The result would have been the same if the plaintiff had not been a small business.

As a result of its rulings, the court denied petitioner's motion for summary judgment and awarded the government $45,772.15 in damages on its counterclaim.

ARGUMENT

Petitioner contends (Pet. 5-16) that the Forest Service violated 15 U.S.C. 637(b)(7)(A) by failing to refer to the SBA its decision to bar petitioner from rebidding. This contention does not warrant review by this Court. The decision of the Court of Claims is correct and does not conflict with any decision of this Court or of a court of appeals. Moreover, in the context presented here, the question presented raises only a narrow issue that is not of broad applicability.

The Court of Claims correctly held that the Forest Service regulation barring rebidding in the circumstances of this case does not conflict with the statute requiring referral to the SBA of all questions relating to the responsibility of a small business contracting with the United States. The Forest Service regulation is not related to questions of the responsibility of a small business. The parties do not dispute that, under 15 U.S.C. 637(b)(7)(A), the SBA has the final say "with respect to all elements of responsibility," and that, depending on the circumstances, a decision not to let a company bid on a new

contract because it defaulted on a prior contract could well be considered a judgment on the responsibility of the company within the SBA's exclusive jurisdiction.

The Forest Service regulation barring rebidding that was applied in this case, however, is not a judgment on the responsibility of the contractor.[2] Rather, it "is designed to encourage completion of timber sales within the contract period." United States Department of Agriculture, *Forest Service Manual*, Section 2431.61 (Dec. 1975) (reprinted in U.S. Br. at Exh. 8). More specifically, its purpose is to discourage speculation on timber prices. The Forest Service regulation bars from bidding on the resale of timber any person who "failed to complete the original contract" either through breach of the contract or "through failure to cut designated timber on portions of the sale area by the termination date * * *." 36 C.F.R. 223.5(h)(1)(ii). The prior contractor cannot be barred from rebidding under this provision unless at least 50% of the timber in the resale is timber that remains uncut from the original sale. 36 C.F.R. 223.5(h)(2)(i).

This provision prevents a company from deliberately deciding as a speculative gambit not to cut most

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[2] It is noteworthy that petitioner only belatedly has sought to characterize the Forest Service's decision as a determination of responsibility. It did not make the argument in its motion for summary judgment. It first addressed the SBA referral issue in its brief opposing the government's cross-motion, and then not as an independent reason for dismissing the government's counterclaim, but rather only to rebut the government's statement that general application of petitioner's interpretation of the Forest Service regulations would permit even a company that irresponsibly had failed to perform under the first contract to bid on the resale. See pages 3-4, *supra*.

or all of the timber that it had originally contracted to cut. At the time of the bidding on a contract, a company might bid and contract for a price above the then-current market price, in the hope that before the contract expires the market price will rise above the contract price, thereby allowing it to cut the timber at a profit. In the absence of the Forest Service regulation, a company could sit back during the contract period without cutting any timber, while waiting for the market price to rise.[3] If the price did not rise during this period, the company would suffer no loss because it could eliminate its liability for damages under the contract for failing to cut simply by bidding again at (or above) the price in the expired contract, thereby also extending its period of speculation for another period of years.[4] With the Forest Service regulation in effect, however, if the company fails to cut at least half of the timber contracted for, it is not permitted to bid on the new contract and thus can be placed in the position of petitioner—liable to the government for damages because the resale netted a lower price than the price in the prior contract. The regulation thus helps the Forest Service to manage a National Forest effectively by assuring that trees are cut under the first contract, at the time when the Forest Service has decided that it is appropriate that they be cut, and

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[3] The contract period in this case was three years, and Forest Service timber contracts often are issued for five-year periods.

[4] Indeed, the pleadings in this case reveal that petitioner's theory for avoiding the government's counterclaim is that, if allowed to rebid, it would have bid for an amount equaling or exceeding its prior price, which would have erased its entire liability for damages under the first contract.

that the necessary timber is not kept off the market by speculators.

This prophylactic rule applies regardless of a company's size. As the Court of Claims explained, "[t]he result would have been the same if [petitioner] had not been a small business" (Pet. App. 9a). The rule is a specific disincentive to a speculative course of conduct that might be a reasonable business judgment, albeit one that would be inimical to the interests of the United States. The Forest Service's decision to adopt this firm rule is entirely unrelated to a determination that a particular business is so small that there is doubt as to its "responsibility," in the sense of its "capability, competency, capacity, credit, integrity, perseverance, and tenacity," as specified in 15 U.S.C. 637(b)(7)(A).[5] Because its decision was not based on a determination of petitioner's "responsibility,"[6] the Forest Service was not required to refer to the SBA its decision to bar petitioner from rebidding.[7]

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[5] The regulation contains an exception that permits the holder of the expired contract to bid when it is determined to be "in the public interest." 36 C.F.R. 223.5(h)(1). Petitioner complains (Pet. 10 n.7) that this gives the Forest Service "unreviewable discretion," but petitioner does not and cannot argue on the record in this case that this discretion allows the Forest Service to disguise as a public interest determination a responsibility determination that is within the SBA's purview. The public interest considerations contemplated by the regulation clearly differ from the elements of responsibility listed in the SBA statute.

[6] Petitioner's statement (Pet. 9) that Section 637(b)(7)(A) reserves to the SBA the final determination of "all elements of *eligibility*" is a misquotation of the statute.

[7] Petitioner argues (Pet. 12-15) that this Court should grant review here because the Court of Claims decision conflicts with *United States* v. *Thompson*, 168 F. Supp. 281

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(N.D. W. Va. 1958), aff'd, 268 F.2d 426 (4th Cir. 1959), and two Comptroller General decisions. This contention is without merit. First, none of the cited decisions is a decision of this Court or a court of appeals (the one-paragraph affirmance in *Thompson* does not discuss the SBA referral issue and, indeed, states that "[n]o question of law is presented by this appeal" (268 F.2d at 426)). Moreover, none of the three decisions is relevant to the specific question raised here, namely, the scope of SBA's jurisdiction to determine "all elements of responsibility," because those cases arose prior to the enactment of the 1977 version of Section 637(b)(7)(A). Finally, each of those cases involved an agency determination that was found to be within the SBA's purview, unlike the Forest Service decision here, which was based on an anti-speculation regulation unrelated to a company's "responsibility."

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